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MPhil Dissertation in Environmental Law  
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## **Seeking access to environmental information in South Africa: A critical review of the relevant legal framework and jurisprudence**

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Philosophy in Environmental Law qualification for which the student is registered in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of MPHIL Environmental law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signed by candidate

**Signed:** Signature Removed

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**List of abbreviations**

BOR	Bill of Rights
CER	Centre for Environmental Rights
DEA	Department of Environmental Affairs
DMR	Department of Mineral Resources
DWA	Department of Water Affairs
MPRDA	Mineral and Petroleum Resources Development Act
NEMA	National Environmental Management Act
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Administrative Justice Act
PDA	Protected Disclosure Act
PDAB	Protected Disclosure Amendment Bill
SAEO	South African Environment Outlook
SCA	Supreme Court of Appeal

## Chapter One: Introduction

### 1.1 Context

In recent years the increased pressure of growing populations on natural resources and the degradation and pollution commonly associated with natural resource exploitation has had significant impacts on the manner in which people engage with the environment.<sup>1</sup> The deterioration of the natural environment due to poorly managed industrial facilities and a lack of governmental and corporate accountability has severe impacts on the health of communities and the natural functioning of ecosystem services on which people rely.<sup>2</sup> The continuous degradation of the quality of air, water and soil alongside the destruction of natural habitats and the overexploitation of fish species has also demonstrated large threats to food security.<sup>3</sup> Trends show that the expansion of human settlements into protected environments is mostly due to excessive urban sprawl, industrial activities, intensive agriculture and mining.<sup>4</sup> The urbanization trend has also manifested itself in increased pressure on existing land and basic services available in urban and peri-urban areas, for example sewage treatment and access to clean drinking water.<sup>5</sup> Continuous mining activity that encroaches onto vital conservation and agricultural areas has further exacerbated degradation.<sup>6</sup> South Africa is also

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<sup>1</sup> Department of Environmental Affairs (DEA) "South Africa Environmental Outlook (SAEO): A report on the state of the environment" (2012) 4. See also Department of Environmental Affairs "State of Air Report: A report on the state of the air in South Africa" (2005).

<sup>2</sup> See Milner, F "Access to environmental justice" (2011) *Deakin Law Review* 16(1) 190 and Glazewski *Environmental Law in South Africa* 6ed LexisNexis Butterworth Durban, Chapter 1. See generally Hardoy, J.E *et al Environmental problems in an urbanising world: Finding solutions for cities in Africa, Asia and Latin America* (2010) Earthscan London & Washington DC.

<sup>3</sup> DEA SAEO (2006) 5. See also DEA: Oceans and Coasts 'South Africa's National Coastal Management Programme' (2014) Cape Town.

<sup>4</sup> DEA SAEO (2012) 3. See also Wiese, L "Soil, food and population pressure – A South African Cinderella story in the making?" (2015) *Agricultural Research Council* 2-3.

<sup>5</sup> A detailed state of the environment report is also given by the Department of Environmental Affairs and Tourism (DEAT) in *SAEO: Executive Summary* (2012) regarding land cover issues, biodiversity, terrestrial and marine ecosystems as well as the state and health of our water resources, oceans and coasts. In terms of water resources and water quality see also Department of Water Affairs (DWA) 'Blue Drop Report' (2012) as well as the 'Green Drop Report' (2012).

<sup>6</sup> See Humby T "The Spectre of Perpetuity Liability for Treating Acid Water on South Africa's Goldfields: Decision in Harmony II" (2013) *Journal of Energy and Natural Resources Law* 31 (4) 453-466. Coetzee H *et al* "Mine water management in the Witwatersrand gold fields with special emphasis on acid mine

home to many rare and endangered fauna and flora and ranks as the third most biologically diverse country in the world.<sup>7</sup> However, as reflected in South Africa's most recent *State of the Environment Report*<sup>8</sup> these rich and diverse landscapes are currently under significant threat as the country grapples with the realities of land transformation, development and the onslaught of water scarcity and climate change.<sup>9</sup> According to the *South Africa Environment Overlook Report*<sup>10</sup> (SAEO) if current rates of loss of natural habitats in North West, Gauteng and Kwa-Zulu Natal continue, little natural vegetation will remain outside of protected areas in these provinces by roughly 2050.<sup>11</sup> Such impacts would not only have significant consequences for human settlements and biodiversity but for the tourism and economic sector as well.<sup>12</sup>

Environmental reports are therefore constantly emphasising that concerns regarding environmental matters are becoming increasingly mainstream in terms of political and business decision-making. South Africa's most recent *National Development Plan*<sup>13</sup> (2012) highlights that environmental impacts are no longer a „periphery issue“ but that they have become part of the development agenda and vision for 2030.<sup>14</sup> The recognition of the interconnectedness between environmental issues, healthy human settlements and the economy is key to understanding environmental governance and the critical role of public participation in decision-making and

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drainage: Report to the inter-ministerial committee on acid mine drainage“ (2010) Department of Water Affairs 6.

<sup>7</sup> Driver *et al* “Life: The state of South Africa’s biodiversity” (2013) *South African National Biodiversity Institute* Pretoria. See also Driver *et al* “National biodiversity assessment: An assessment of South Africa’s biodiversity and ecosystems: Synthesis report” (2012) *South African National Biodiversity Institute & Department of Environmental Affairs*, Pretoria.

<sup>8</sup> DEA SAE0 (2012).

<sup>9</sup> Wynberg, R “A decade of biodiversity conservation and use in South Africa: Tracking progress from Rio Earth Summit to the Johannesburg World Summit on Sustainable Development” (2002) *SAJS* 98 233.

<sup>10</sup> DEAT SAE0 (2012) 3.

<sup>11</sup> DEAT SAE0 (2012) 91.

<sup>12</sup> Cadman *et al* “Biodiversity for development: South Africa’s landscape approach to conserving biodiversity and promoting ecosystem resilience” (2010) *South African National Biodiversity Institute* 14.

<sup>13</sup> National Planning Commission “Our future-make it work” (2012) *Nation Development Plan: Executive Summary*.

<sup>14</sup> National Planning Commission (2012) *Nation Development Plan* 197.

administration.<sup>15</sup> An effective environmental regulatory system that depends heavily on its enforcement mechanisms, cooperative approaches between citizens, government and the private sector as well as public participation is therefore essential.<sup>16</sup>

South Africa's transition to a constitutional democracy reformed not only the civil and political landscape of the country but also provided the impetus for the transformation of South Africa's environmental law and governance regime.<sup>17</sup> As such, South Africa has seen the emergence of a mass of environmental legislation aimed at better regulation and management of natural resources and the need to oversee sustainable development in all spheres of government.<sup>18</sup> The inclusion of an environmental right in the Constitution of the Republic of South Africa<sup>19</sup> (the Constitution) provided the initial stepping-stones for citizens, organizations and the State to take action in the realm of environmental protection and the enforcement of environmental laws.<sup>20</sup> As in most developing countries however, the interpretation, application and enforcement of these laws remains an on-going challenge. The need to balance competing socio-economic interests with unrelenting environmental bottom lines contributes immensely to this challenge.<sup>21</sup> The environmental right<sup>22</sup> accordingly places a duty on the State to take measures to ensure the realization of the right through the promulgation of legislation that enables

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<sup>15</sup> DEAT "A National Framework for Sustainable Development in South Africa" (2008) DEAT 13-15.

<sup>16</sup> Nemesio, I "Strengthening environmental rule of law: Enforcement, combatting corruption, and encouraging citizen suits" (2015) *The Georgetown International Environmental Law Review* 27 322.

<sup>17</sup> Kotze, L & Paterson, A *The Role of the Judiciary in Environmental Governance: Comparative Perspectives* (2009) Kluwer Law International 557.

<sup>18</sup> The main national environmental legislation includes our framework legislation the National Environmental Management Act 107 of 1998 as well as other sectoral laws such as the National Environmental Management Protected Areas Act 57 of 2003, National Environmental Management Biodiversity Act 10 of 2004, the National Environmental Management Waste Act 59 of 2008, the National Water Act 36 of 1998 and the National Environmental Management Air Quality Act 39 of 2004.

<sup>19</sup> The Constitution of the Republic of South Africa, 1996, s 24.

<sup>20</sup> Winstanley, T "Entrenching environmental protection in the new Constitution" (1995) *SAJELP* 1 85.

<sup>21</sup> Kotze, L & Paterson, A *The Role of the Judiciary in Environmental Governance: Comparative Perspectives* 558.

<sup>22</sup> Constitution, s 24.



enforcement by citizens.<sup>23</sup> Individuals may therefore assert this right at the highest possible constitutional level.<sup>24</sup> As such, various role players exist, that may participate in environmental governance efforts within all spheres of government and in the public and private domains.<sup>25</sup> Recent definitions of environmental governance have begun to include more participatory and constitutionally acceptable language.<sup>26</sup> The inclusivity of local knowledge, capacities and practices, together with more formal government structures make up the multi-scale, multi-actor governance framework in which public participation efforts in the environmental context must function.<sup>27</sup> Many commentators have emphasised that participatory governance is therefore the key to good governance as it relies on trust and reciprocal relations between authorities and citizens.<sup>28</sup> Some fundamental rights have been described as meaningless when not guaranteed a means of recognised participation by right-holders in their implementation.<sup>29</sup>

The notion of public participation therefore links systematically with the analyses of environmental rights, the sharing of information and open dialogue between all stakeholders and interested parties.<sup>30</sup> In this regard, commentators assert that the idea that „the governed should engage in their governance“ is „gaining ground and rapidly expanding in both law and

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<sup>23</sup> See generally Glazewski *Environmental Law in South Africa* 3ed 67-81 and Kidd *Environmental Law* 20-44.

<sup>24</sup> Kotze, J “The judiciary, the environmental right and the quest for sustainability in South Africa: A critical reflection” (2007) *RECIEL* 16(3) 299.

<sup>25</sup> Kotze, L (2007) *RECIEL* 16(3) 300.

<sup>26</sup> Chauke, T (2014) “Good environmental governance in local government: A practice brief on environmental and climate change governance for South African municipalities” *South African Local Government Association* 1 3-4.

<sup>27</sup> Holley, C & Gunningham, N (2011) “Natural resources, new governance and legal regulation: When does collaboration work?” *New Zealand Universities Law Review* 24 310-314. See also Nel, J& Du Plessis, W “Unpacking integrated environmental management: A step closer to effective cooperative governance” *IAIASA Conference Proceedings* (2003) 89.

<sup>28</sup> Fakier *et al* (2005) “Environmental governance: Background research paper produced for the South African Environmental Outlook report on behalf of the Department of Environmental Affairs and Tourism” *SRK Consulting* 4-5.

<sup>29</sup> Du Plessis “Public participation, good environmental governance and fulfilment of environmental rights” (2008) *PER/PELJ* 11(2) 170.

<sup>30</sup> Legislative Sector South Africa (2013) *Public Participation Framework for the South African Legislative Sector* 14-15 [www.sals.gov.za](http://www.sals.gov.za) (accessed 13.01.16).

practice”.<sup>31</sup> The essential understanding that citizens ought to participate in decision-making that effects them<sup>32</sup> is expanded through environmental rights being described as:

“[h]uman rights that epitomise in a holistic fashion and in legal terms the integrated interrelationship between humans and the environment and the claim of people to an environment of a particular quality”.<sup>33</sup>

The accountability of decision-makers is also reinforced if environmentally relevant processes are open to public inquiry.<sup>34</sup> Openness and participation pressurises administrators to follow prerequisite procedure<sup>35</sup> and enhances community ownership of decisions and subsequent outcomes, as the community becomes part of the broader decision-making process.<sup>36</sup> A plethora of public participation methodologies exists in the realm of environmental management however one of the key methods and the focus of this dissertation, is the sharing and access to information.<sup>37</sup> The ability to access information enables the public to involve themselves in environmental decision-making and promotes the scrutiny of non-transparency.<sup>38</sup> The availability of consistent, updated and relevant environmental information is therefore a pre-requisite for the promotion of effective and transparent public participation in environmental governance.<sup>39</sup> Governments are in a position to provide the necessary legislative framework and associated policies and

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<sup>31</sup> Paupp, T *Redefining Human Rights in the Struggle for Peace and Development* (2014) Cambridge University Press 140.

<sup>32</sup> Wilkinson, P “Public Participation in Environmental Management: A Case Study” (1976) *Natural Resource Journal* 16 117-135.

<sup>33</sup> Feris, L “The role of good environmental governance in the sustainable development of South Africa” (2010) *PER / PELJ* (13) 1 75.

<sup>34</sup> See generally Chauke, T (2014) *South African Local Government Association* 1 3-4.

<sup>35</sup> O’Connor (2012) *South African History Archive* 1-4.

<sup>36</sup> Wilkinson (1976) *Natural Resource Journal* 16 119.

<sup>37</sup> Reed, M “Stakeholder participation for environmental management: A literature review” (2008) *Biological Conservation* 141 2418.

<sup>38</sup> See generally Villeneuve W “Transparency of transparency: The pro-active disclosure of the rules governing access to information as a gauge of organisational cultural transformation. The case of the Swiss transparency regime” (2014) *Government Information Quarterly* 31 556- 559.

<sup>39</sup> Feris (2010) *PER / PELJ* (13) 1 74.

training manuals through the enactment of formal statutes that theoretically guarantee citizens a right of access to information.<sup>40</sup>

The *Promotion of Access to Information Act*<sup>41</sup> (PAIA) effectively regulates and codifies the right of access to information enshrined in the South African Constitution.<sup>42</sup> Additionally, in association with PAIA, the *Regulations regarding the Promotion of Access to Information*<sup>43</sup> (PAIA Regulations) were promulgated in order to guide requesters and to aid information officers with their legal duties to assist applicants.<sup>44</sup> Although the *National Environmental Management Act*<sup>45</sup> (NEMA) played an initial role in providing specific access to environmental information prior to PAIA, the relevant access provisions were repealed in order to avoid the creation of parallel systems of access. Only certain provisions relating to the protection of whistle-blowers remain.<sup>46</sup> In 2008, the South African legislature sought to review the *Protection of Information Act*<sup>47</sup> and introduced the *Protection of State Information Bill* (the Bill) to Parliament. The aim of the Bill is to set out a statutory framework for the protection of state information through the provision of criteria that ultimately protect state information from destruction or unlawful disclosure.<sup>48</sup> It has not however been finalised.

Despite South Africa's comprehensive legal access to information regime, several disputes have been referred to the courts. The outcomes of these disputes illustrate the myriad of challenges faced in framing requests for

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<sup>40</sup> Arko-Cobbah, A "The right of access to information: Opportunities and challenges for civil society and good governance in South Africa" (2008) *IFLA Journal* 34(2) 181.

<sup>41</sup> Act 2 of 2000.

<sup>42</sup> Constitution, s 32.

<sup>43</sup> *Regulations relating to the Promotion of Access to Information* GNR223 in *Government Gazette* No. 22125, dated 9 March 2001.

<sup>44</sup> Regulation 3 and 5 of the *Regulations* include details regarding the applicable fees and forms required for both public and private bodies respectively. See also O'Connor (2012) *South African History Archives* 8-10.

<sup>45</sup> Act 107 of 1998.

<sup>46</sup> NEMA, s 31.

<sup>47</sup> Act 82 of 1982.

<sup>48</sup> See the Right2Know campaign website ([www.R2K.org.za](http://www.R2K.org.za)) which details the apparent flaws of the Bill (accessed on 05.01.16).

access to environmental information.<sup>49</sup> They have also illustrated the inherent risk and seemingly skewed statutory protection afforded to commercial and confidential information.<sup>50</sup> Further, recent reports released by environmental NGO's in South Africa appear to lend some credence to the argument that access to information, although comprehensively regulated, remains somewhat of an ideal as opposed to a reality in South Africa.<sup>51</sup> The status quo still shows substantial political and commercial resistance in abiding by PAIA.<sup>52</sup> In this regard, it has been suggested that the success of the courts in enforcing PAIA, is mixed.<sup>53</sup> It is nonetheless imperative that substantive and practical issues be monitored through the courts pronouncements thereon.<sup>54</sup> As such, a distillation of recent cases and PAIA provisions as interpreted by the courts in the environmental context could provide valuable lessons for future access seekers.

## 1.2 Aim and Scope

The aim of this dissertation is twofold. Firstly, it critically assesses whether South Africa has an effective legal regime providing for access to information. Secondly, it considers what guidance the judiciary has provided regarding seeking access to environmental information. In order to meet the first aim, the paper critically assesses what key legal elements make up an effective access to information regime. It then compares these elements against existing PAIA provisions and critically assesses whether PAIA and its supporting legislation provide for an effective access to information regime. Although the dissertation draws upon the key legal elements of PAIA, which is not an environmental law, the paper focuses almost solely on the manner in which PAIA provides for

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<sup>49</sup> Du Plessis (2008) *PER/PELJ* 11(2) 176.

<sup>50</sup> Kotze, L & Paterson, A *The Role of the Judiciary in Environmental Governance: Comparative Perspectives* 582.

<sup>51</sup> Centre for Environmental Rights "Unlock the doors: How greater transparency by public and private bodies can improve the realization of environmental rights" (2012) *Open Society Foundation for South Africa* 1-24.

<sup>52</sup> CER (2015) *Open Society Foundation for South Africa* 3-4.

<sup>53</sup> Peekhaus, W "South Africa's Promotion of Access to Information Act: An analysis of relevant jurisprudence" (2014) *Journal of Information Policy* 4 571.

<sup>54</sup> O'Connor (2012) *The South African History Archive* 2.

access to environmental information although where relevant also draws upon applicable provisions of other supporting legislation. Although relevant, the Protection of State Information Bill in its current form is excluded from the scope of this dissertation due to the uncertainty of its future.

In meeting the second aim of this dissertation, a blended discussion of the key legal elements described above is used as a framework to draw on relevant jurisprudence in the form of a critical review. Several cases address pertinent issues pertaining to the use of PAIA as a means to access useful environmental information from public and private bodies in order to enforce the rights of the applicants. Although South Africa's access to information regime is made up of both proactive and reactive disclosure mechanisms in terms of access to information held by public bodies, the dissertation focuses on reactive disclosure as does the literature and selection of cases. The dissertation refers to proactive disclosure mechanisms where it is necessary to broaden understanding. The relevant cases used illustrate differing examples of procedural and substantive issues faced by litigants in accessing information. Given the pivotal role played by the courts in providing access to information by individuals and organisations, an analysis of their interpretations may assist in guiding future litigants in the environmental field. Among others, three important cases that consider the challenges faced in accessing environmental information; namely, the *Earthlife*<sup>55</sup>, *Biowatch*<sup>56</sup> and *VEJA*<sup>57</sup> are reviewed. Although not drawn on exclusively, as other non-environmentally specific cases also provide useful insights, they do form the bulk of the analysis provided in meeting the second aim of this dissertation.

### 1.3 Methodology and Structure

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<sup>55</sup> *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another* 2005 (3) SA 156 (C).

<sup>56</sup> *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC).

<sup>57</sup> *Vaal Environmental Justice Alliance, Company Secretary, ArcelorMittal South Africa Ltd and Another* 2015 (1) SA 515 (SCA).

In order to achieve the two abovementioned aims, the dissertation splits into several chapters. Part 1 of Chapter 2 examines the theoretical context in which the access to information regime operates in the context of environmental governance and public participation. For the sake of clarity, it is vital to point out here, that although a critical distinction exists between procedures for access to information held by public and private bodies; the dissertation is written by means of a blended discussion of both where most relevant to the theory or jurisprudence under analysis. Chapter 2 firstly attempts to aid a deeper understanding of the important conceptual links between environmental governance, public participation and access to information. It then moves on to a discussion of the importance of the promotion of access to information in the environmental context specifically and focuses on what forms of environmental information exist and what the benefits are of granting access to such information. The role of rights and the applicable law in the promotion of such access to information is subsequently explored.

Part 2 of Chapter 2, using the relevant literature, draws out five essential legal elements that have shown to make up effective access to information regimes. These five essential legal elements include the scope and nature of information, limitations, access procedures, protection of whistle-blowers and mechanisms for appeal and review. These five elements have renowned prominence in the literature, relevant legislation, commentary and case law under analysis; and as such are a good starting point for any critical assessment. The five elements therefore do not canvas the entire access to information regime but rather attempt to follow a logical structure guided by academic legal sources.

Chapter 3 provides a critical assessment of South Africa's legal regime; and comprises of two main parts. These two parts are informed by the theoretical analysis provided in Chapter 2. Part 1 of Chapter 3 provides a brief overview of South Africa's overarching legal scheme and the manner in which its components relate to one another in the environmental context. The key laws

considered are the *Constitution*, the *Promotion of Access to Information Act*, the *Regulations regarding the Promotion of Access to Information* as well as the *National Environmental Management Act*. Part 2 of Chapter 3 provides a critical review of the legal scheme as well as the jurisprudence that has emerged to give content and guidance to its implementation. This section is structured according to the same five essential legal elements used in Chapter 2. This repetition illustrates the necessary link between the theoretical and practical components of the analysis and aids the coherence and consistency of the dissertation. In respect of each of these five essential elements, for both public and private bodies, the dissertation critically reviews, in an integrated fashion, the relevant legal framework, jurisprudence and associated academic commentary. Having undertaken this analysis, Chapter 4 of the paper addresses the two main aims of the paper as set out in Chapter 1, referencing the outcomes for each of the five key elements. It then contemplates whether South Africa has an effective access to information regime; and what guidance the judiciary has provided regarding seeking access to environmental information in the future.

## **Chapter Two: The Theoretical Framework: Promoting Access to Environmental Information**

In order to grasp the motivation behind the assessment of the current state of access to environmental information in South Africa it is necessary to provide a theoretical foundation through which to understand key theoretical concepts. The meaning of and conceptual links between environmental governance, public participation and access to environmental information are therefore unpacked followed by an overview of the forms and value of environmental information and the role of rights and legislation in its appropriation. From this, a detailed analysis of the key legal elements that make up any effective access to environmental information regime are drawn from the literature.

## 2.1 Understanding the Conceptual Links

### 2.1.1 Environmental governance

The scale and complexity of challenges facing natural resource management today have summoned a „common focus“ that emphasises the need for cooperation between many institutional sectors and stakeholders.<sup>58</sup> In doing so, the daunting task of managing environmental challenges can be addressed through mobilisation of society and the available intellectual input, good will and determination of all stakeholders.<sup>59</sup> The central reality of environmental governance therefore appears to be founded on its cooperative nature and reliance on a widespread array of third parties in addition to traditional governmental structures.<sup>60</sup> The governance approach therefore looks beyond the formal structures and focuses on the actors participating inside and outside of the formal allocation of power.<sup>61</sup> As such environmental governance comprises of „...the rules, practices, policies and institutions that shape how humans interact with the environment“.<sup>62</sup> The significance of the governance approach is that it extends a step further and allows for the inclusion of local knowledge, practices and alternative systems of management.<sup>63</sup>

Good environmental governance therefore considers the role of *all* actors that impact on the environment and may include members from government, NGOs, the private sector or civil society.<sup>64</sup> Cooperation and transparency between these actors is critical to achieving an effective and open governance

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<sup>58</sup> Muller, K “Organisational innovation: Some emerging environmental governance models in South Africa” (2007) *Politeia* 26 (1) 46.

<sup>59</sup> Nealer, J “Access to information, public participation and access to justice in environmental decision-making” (2005) *Journal of Public Administration* 40 (3.2) 470.

<sup>60</sup> Muller, K “Assessing cooperative environmental governance systems: the cases of the Kogelberg Biosphere Reserve and the Olifants-Doorn Catchment Management Agency” (2008) *Politeia* 27 (1) 87.

<sup>61</sup> Muller (2008) *Politeia* 27(1) 88.

<sup>62</sup> Nagai, M “Environmental Governance” (2009) *United Nation Environment Programme* 1.

<sup>63</sup> For a detailed example of environmental governance in action in the context of water see Kuzdas, C& Wiek, A “Governance scenarios for addressing water conflicts and climate change impacts” (2014) *Environmental Science and Policy* 42 182.

<sup>64</sup> Nealer (2005) *Journal of Public Administration* 40 (3.2) 473.



regime in the promotion of sustainable development.<sup>65</sup> In order for all actors to function and participate effectively in environmental governance, certain tools are required. One such tool and the focus of this dissertation is the means with which to enforce the right of access to information through public participation in environmental governance. Public participation is an essential element to any well-functioning democracy and to the achievement of environmental sustainability.<sup>66</sup>

### 2.1.2 Public participation

Participation and active citizenship are a means with which to promote healthy community engagement to enhance the quality of life of groups and individuals, to promote social inclusion, to strengthen social capital and to generate community empowerment.<sup>67</sup> Arguably, due to a lack of environmental justice within the environmental governance framework, disadvantaged members of society, in the wake of climate change, typically bear the burden of environmental risks.<sup>68</sup>

The need for greater public participation is a common theme throughout social science and environmental management literature hence it is pivotal to understand its role in environmental governance.<sup>69</sup> The rationale for public participation asserts the philosophy that in a democratic society, ordinary citizens should have the maximum opportunity to access mechanisms with which to participate in actions and decisions that affect their lives.<sup>70</sup> As such, there is enormous value in public participation in environmental planning, decision-making and governance efforts. Information governance in particular,

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<sup>65</sup> Feris (2010) *PER/PELJ* 13(1) 75.

<sup>66</sup> Nealer (2005) *Journal of Public Administration* 40 (3.2) 473.

<sup>67</sup> Mannarini, T & Talo, C "Evaluating public participation: instruments and implications for citizen involvement" (2013) *Community Development* 44(2) 239.

<sup>68</sup> Milner (2011) *Deakin Law Review* 16(1) 190.

<sup>69</sup> Daley, D (2008) "Public participation and environmental policy: What factors shape state agency's public participation provisions?" *Review of Policy Research* 25(1) 22.

<sup>70</sup> Sowman, M "Improving the practice of public participation in environmental planning and decision-making in South Africa" (1994) *Town and Regional Planning* 36 20.

ties closely to the societal transformation triggered today by information generation, processing, transmission and use in the environmental governance domain.<sup>71</sup> Information that has a transformative capability for society as a whole will also inevitably affect the role of citizens.<sup>72</sup>

Public participation allows for the transfer of useful information and insights into community needs and preferences thereby facilitating an open dialogue in the implementation of plans that have an impact on people and the environment.<sup>73</sup> The accountability and transparency of decision-makers is thereby measured against the ability to cater to open dialogue and to reflect on community needs and environmental factors that should be taken into account when making decisions. Further, the accountability of decision-makers is likely to be supported if the process is open to opportunity for public scrutiny through the sharing of information.<sup>74</sup> It is therefore imperative that States facilitate and encourage public awareness and participation by making information widely available and encouraging actors to use information to assert their rights.<sup>75</sup> Without the integration of citizen viewpoints, environmental governance processes run the risk of being delayed or ending up in court. This can be avoided if due regard is initially given to the necessity of public participation through the facilitation of access to environmental information.<sup>76</sup> This is a useful mechanism in the environmental context where vital information in the public interest is commonly withheld from public involvement due to overriding commercial or confidentiality interests.

### 2.1.3 Access to information

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<sup>71</sup> Soma *et al* "Roles of citizens in environmental governance in the information age- four theoretical perspectives" (2016) *Current Opinion in Environmental Sustainability* 18 123.

<sup>72</sup> Munoz-Erickson, T& Cutts, B.B "Structural dimensions of knowledge-action networks for sustainability" (2016) *Current Opinion in Environmental Sustainability* 18 58.

<sup>73</sup> Sowman (1994) *Town and Regional Planning* 36 20.

<sup>74</sup> Holley & Gunningham (2011) *New Zealand Universities Law Review* 24 313. See Mol, P. J "Environmental governance in the information age: The emergence of informational governance" (2006) *Environment and Planning, Government and Policy* 24 497-514 for a detailed analysis on the impact of the information age on environmental governance.

<sup>75</sup> Mannarini & Talo (2013) *Community Development* 44(2) 242.

<sup>76</sup> See generally Wilkinson (1976) *Natural Resource Journal* 16 117-135.

In order for public participation in environmental governance to be successful, the public needs access to specific and varying information concerning the state of the environment.<sup>77</sup> Access to such information enables the public to understand the broad and dynamic environmental and regulatory context within which they operate. Before the institution of any environmental measures, whether administrative, civil or criminal, it is clear that evidence and information must be gathered.<sup>78</sup> Environmental enforcement entities and the public rely heavily on environmental information to hold violators accountable in order to ensure continued environmental preservation.<sup>79</sup> In many instances, potential grounds for appeal and judicial review will only be apparent when the relevant records are scrutinised.<sup>80</sup> This reality implies that access to information is an indispensable requirement for effective public participation in environmental decision-making as it enables the public to make informed contributions to environmental debate.<sup>81</sup>

Importantly, the usefulness of access to information by the public is heavily dependent on its comprehensibility by the lay public. Effective access regimes should provide the means with which to facilitate participation on all levels. Failure to do so may result in access to justice being dependent on challenging technical information on its own terms.<sup>82</sup> Disappointingly, States often overlook citizens as one of the greatest resources for the enforcement of environmental laws and regulations; yet they are most commonly those that function as environmental watchdogs on behalf of the public interest where the

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<sup>77</sup> See generally Wright *et al* "Challenging times for environmental health in South Africa: The role of the Environmental Health Research Network" *South African Medical Journal* 104(1) 20-21 for an example of the sources of environmental information that impact on human health.

<sup>78</sup> Du Plessis, W "Access to Information" in Paterson & Kotze (eds) *Environmental Enforcement and Compliance in South Africa: Legal Perspectives* (2009) 198.

<sup>79</sup> Peekhaus, W "Biowatch South Africa and the challenges in enforcing its constitutional right to access to information" (2011) *Government Information Quarterly* 28(4) 542. See generally Kidd "Public Interest Litigation: Recent Cases Raise Possible Obstacles" (2013) *PER* 13(5).

<sup>80</sup> Moules *Environmental Judicial Review* 347.

<sup>81</sup> Du Plessis, W "Access to Information" in Paterson and Kotze (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 198.

<sup>82</sup> Lee, M & Abbot, C "Legislation: The usual suspects? Public participation under the Aarhus Convention" (2003) *The Modern Law Review Limited* 66(1) 84.

state is inactive.<sup>83</sup> Very often environmental interest groups also function as external bodies that encourage certain influences on policy or put pressure on government departments to fulfil their mandated duties and therefore play an unofficial oversight role.<sup>84</sup> Further, it has been argued that the involvement of the public through the dissemination of environmental information:

“...increases the accountability of the decision-maker in a way that compliments the accountability that can be imposed by courts, by a minister or even by periodic government elections”.<sup>85</sup>

Public involvement in accessing environmental information therefore has the potential to act as a check on government authorities and their ability to neglect democratic values and fundamental environmental rights.<sup>86</sup>

## 2.2 Promoting Access to Environmental Information

### 2.2.1 Forms of information

Environmental information sharing inevitably depends on the availability of information and the realisation of the value of research, data-collection and storage.<sup>87</sup> The comprehensive management of information held in information systems, in the public sector particularly, is an indispensable requirement of democratic governance.<sup>88</sup> For effective access to information held by public bodies, access legislation imposes significant duties and responsibilities on

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<sup>83</sup> Casey-Lefkowitz *et al* *Fourth International Conference on Environmental Compliance and Enforcement* 1. Cane, P “Participation and constitutionalism” (2010) *Federal Law Review* 38(3) 321.

<sup>84</sup> Klaaren *et al* “Public interest litigation in South Africa: Special issue introduction” (2011) *SAJHR* 27 1-3.

<sup>85</sup> Du Plessis (2008) *PER/PELJ* 182.

<sup>86</sup> Meijer, A “Understanding the complex dynamics of transparency” *Public Administration Review* 73(3) 430.

<sup>87</sup> Haklay, M. E “Public access to environmental information: past, present and future” (2003) *Computers, Environment and Urban Systems* 27 164.

<sup>88</sup> Gupta, A “Transparency under Scrutiny: Information Disclosure in Global Environmental Governance” (2008) *Global Environmental Politics* 8(2) 2.

public authorities to keep records and to give access to the records when required to protect rights and improve over all service delivery.<sup>89</sup> The importance of sound record keeping must be realised to meet this goal.<sup>90</sup>

Forms of *environmental information* vary and are interpreted broadly in both foreign and domestic legal access regimes.<sup>91</sup> Governments have treated a variety of documents including information relating to genetically modified crop trials, diseased cattle, pesticide testing as well as land use planning, as environmental information.<sup>92</sup> Courts have also interpreted the notion of environmental information broadly and have considered among others, records relating to development impact reports, hazardous waste, genetically modified organism data as well as various authorisations and licences as environmental information.<sup>93</sup>

Without access to these types of records, it is almost impossible to prove whether a violation has taken place.<sup>94</sup> In the environmental context, the need to collect updated and scientifically reliable data regarding for example, air, soil and water quality levels, substance emissions, discharge rates and other environmental impacts, is of high priority in the verification and prosecution of environmental crime.<sup>95</sup> In order to realise environmental rights and their harmonisation with public participation, it is required of governments to distribute factually valid environmental information to all stakeholders on a

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<sup>89</sup> Mutula, S & Wamukoya, J. M “Public sector information management in east and southern Africa: Implications for FOI, democracy and integrity in government” (2009) *International Journal of Information Management* 29 333.

<sup>90</sup> See Enwerem, P.C “The right to know and the implementation of freedom of information legislation: Case Studies of Nigeria and South Africa” (2014) MA Thesis, Central European University 1-88.

<sup>91</sup> Moules, R *Environmental Judicial Review* (2011) Hart Publishing Ltd Oxford 349-351.

<sup>92</sup> See also ICO Guidance “What is environmental information?” (2009) *Environmental Information Regulations* 3.

<sup>93</sup> See the English case *Mecklenburg v Kreiss Pinneberg der Landrat* C-321/96 (1998) ECR where the all-embracing nature of ‘environmental information’ is considered in detail.

<sup>94</sup> Casey-Lefkowitz *et al* (no year) *Fourth International Conference on Environmental Compliance and Enforcement* 5.

<sup>95</sup> Eaglesham, D, J “Open access and the free flow of scientific information” (2006) *Material Matters* 31 78. See also Lee, M & Abbot, C “Legislation: The usual suspects? Public participation under the Aarhus Convention” (2003) *The Modern Law Review Limited* 66(1) 86.

regular basis for the enhancement of public participation in the development of environmental legislation, policies and programmes".<sup>96</sup>

### 2.2.2 Means and outcomes of access

The importance of the right of access to information is intertwined with each nation's concept of public participation, integrity, transparency and accountability;<sup>97</sup> and is as such critical in exposing corruption and maladministration as it allows for the opportunity to scrutinize records and to appeal or review decisions.<sup>98</sup> In terms of access to information held by private bodies, depending on the legislation of the particular nation, access is often far more stringent because of competing interests. Information about pollution at industrial facilities, for example, is often the hardest information for the public to access.<sup>99</sup> In some instances, emission inventories such as a Pollutant Release and Transfer Register (PRTR) provide vital information about whether facilities are conforming to the standards set to limit the release of substances into the environment.<sup>100</sup> Pollution registers provide invaluable environmental information and further provide evidence-linking information held by registers to impacts on people and the environment.<sup>101</sup> Many industrial businesses have multiple impacts on the environment, many of which are simply not reflected in traditional annual reports or financial statements exacerbating the possibility of significant and long-standing effects on the environment.<sup>102</sup> Some countries

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<sup>96</sup> Sand, P.H *The right to know: Environmental information disclosure by government and industry* Institute of Environmental Law University of Munich (2002) 4-6.

<sup>97</sup> Armstrong, E "Integrity, transparency and accountability in Public Administration: Recent trends, regional and international developments and merging issues" (2005) *UN Economic & Social Affairs* 1.

<sup>98</sup> Razzano, G "National Anti-corruption Forum: Access to information and the fight against corruption" (2012) *Open Democracy Advice Centre* 3.

<sup>99</sup> Fakier *et al* Environmental Governance: Background Research Paper produced for the South Africa Environmental Outlook report on behalf the Department of Environmental Affairs and Tourism (2005) SRK Consulting 21.

<sup>100</sup> See generally Griggs, D *et al* "Policy: Sustainable development goals for people and planet" (2013) *Nature* 465 305-307.

<sup>101</sup> Nealer (2005) *Journal of Public Administration* 40 (3.2) 473.

<sup>102</sup> Deagan, C & Rankin, M "The materiality of environmental information to users of annual reports" (1997) *Accounting, Auditing & Accountability Journal* 10(4) 564. See generally also Wong, C "Leveraging Environmental Information Integration to Enable Environmental Management Capability and Performance" (2013) *Journal of Supply Chain Management* 49(2) 114-136.

have however recognised that data regarding pollution emissions and health impacts on a society should never be limited as a commercial interest because the effects influence everyone's wellbeing.<sup>103</sup>

Various actors have stakes in accessing environmental information and include for example consumers, employees, suppliers, funders, government agencies, surrounding communities and environmental interest groups.<sup>104</sup> Environmental information is useful for a number of activities besides environmental enforcement and government accountability for example investment and employment. The worth of true and consistent environmental information is therefore highly valued due to the affects it has on the decisions of users and interested parties.<sup>105</sup>

### 2.2.3 The role of rights and the law

In 1990, there were access laws in only a handful of countries<sup>106</sup> but today over 100 countries have adopted laws that give citizens a right to access information held by public bodies.<sup>107</sup> In the environmental context, the progressive inclusion of environmental rights in domestic constitutions has meant that other civil and political rights, such as the right of access to information or administrative justice can aid in their realisation before a court.<sup>108</sup>

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<sup>103</sup> Nealer (2005) *Journal of Public Administration* 40 (3.2) 475.

<sup>104</sup> Mitchell, C.G & Quinn, N.W "Environmental reporting disclosure in South Africa: A comparative study of the expectations of selected groups of preparers and users" (2005) *Meditari Accountancy Research* 13(2) 17-18.

<sup>105</sup> Deagan & Rankin (1997) *Accounting, Auditing & Accountability Journal* 10(4) 564-566.

<sup>106</sup> Dick, A. L "Power is information: South Africa's promotion of access to information act in context" (2005) *Mousaion* 23(1) 2-3.

<sup>107</sup> Mendel, T "Designing Right to Information Laws for Effective Implementation" (2015) *Right to Information Working paper Series* 3 World Bank 5.

<sup>108</sup> Murumbo, T & Valentine, H "Slapp suits: An emerging obstacle to the public interest environmental litigation in South Africa" (2011) *SAJHR* 27 85-87.

The right of access to information emerges from the notion that citizens „own“ the information that the state collects and holds on their behalf.<sup>109</sup> Traditionally, access to information was accepted as a civil and political right however, it now ties in greatly to the enforcement of social and economic rights.<sup>110</sup> The role of rights and the law in this regard relates to the theoretical rights based model of access to information „as a power“.<sup>111</sup> This is important in terms of the application of the right because it has the „potential to reverse the power relationship between the state and the citizen“.<sup>112</sup> Hence, the right of access to information is generally applicable between natural or juristic persons (horizontal application) as well as between natural or juristic persons and the State (vertical application).<sup>113</sup>

Global trends have therefore reflected increased promulgation of national legislation giving effect to this right.<sup>114</sup> In the environmental context, the last two decades have also seen an increased recognition that rights of access to environmental information are critical to sustainable development and effective public participation in environmental governance efforts.<sup>115</sup> Access rights and associated legislation plays an important role in the reform of government information management requiring government officials to arrange information in a form that most aids decision-making and widely accessible public participation.<sup>116</sup> A continuous challenge however, one that merits a dissertation on its own, has been the consistent policy-practice gap in many countries caused by a failure to implement access laws properly.<sup>117</sup> This reiterates the

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<sup>109</sup> Snell, R & Sebina, P.M “Information flows: the real art of information management and freedom of information” (2007) *Archives and Manuscripts* 35(1) 55-70.

<sup>110</sup> Milner, F “Access to environmental justice” (2011) *Deakin Law Review* 16(1) 110.

<sup>111</sup> Calland, R & Bentley, K “The impact and effectiveness of accountability and transparency initiatives: Freedom of information” (2013) *Development Policy Review* 31 72.

<sup>112</sup> Nadgrodkiewicz *et al* “Improving public governance: Closing the implementation gap between law and practice” (2012) *Center for International Private Enterprise and Global Integrity* 1-2.

<sup>113</sup> Currie, I & De Waal, J *The Bill of Rights Handbook* 6 ed (2013) Juta & Co Ltd Cape Town 45.

<sup>114</sup> Mendel, T *Freedom of information: A comparative legal study* 2 ed (2008) *United Nations Educational Scientific and Cultural Organization* 20.

<sup>115</sup> Mendel (2008) *United Nations Educational Scientific and Cultural Organization* 20-21.

<sup>116</sup> Right2Info ‘Scope of information covered’ (2013) *Open Society Justice Initiative* <http://www.right2info.org/scope-of-covered-information> (accessed online 11.01.16). See also Haklay, M. E (2003) *Computers, Environment and Urban Systems* 27 163-164.

<sup>117</sup> Neuman, L& Calland, R “Making the access to information law work” in Florini *The Right to Know* (2007) Columbia University Press 2-4. See generally Halachmi, A “Governance and risk management:



need to provide not only for the right of access to information but also for the active facilitation of access through diverse implementation measures and enforcement mechanisms overseen by an independent body.<sup>118</sup>

## **2.3 Essential Legal Elements of an Effective Access to Environmental Information Regime**

### **2.3.1 Scope and nature of information**

Although similar, access to information legislation around the world usually has its own unique flavour.<sup>119</sup> For the most part, access regimes target the executive and administrative bodies that comprise the bureaucratic state in which information requesters operate. This includes various departments that, among other things, provide for public health, environmental management, law enforcement, education and transportation within various spheres of government.<sup>120</sup> Practice reveals that taking a broad definition of public bodies to include any body that is utilizing government functions is becoming the norm in these environments.<sup>121</sup> The scope of access to information laws is therefore broad and generally covers information-based and document-based access procedures, although the former is far more common.<sup>122</sup>

Information-based regimes generally require authorities to be receptive to requests for information and to compile information from various sources if required.<sup>123</sup> As mentioned there are two main means through which

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The challenge of accountability, transparency and social responsibility" (2014) *International Review of Public Administration* 8(1) 71-73.

<sup>118</sup> Mendel (2015) *Right to Information Working paper Series 3* World Bank 5.

<sup>119</sup> Lemieux et al "Transparency and Open Government: Reporting on the Disclosure of Information" (2015) *JeDEM* 7(2) 90.

<sup>120</sup> Banisar, D "Freedom of Information around the World: A Global Survey of Access to Government Information Laws" (2006) *Privacy International* 20.

<sup>121</sup> Banisar (2006) *Privacy International* 20.

<sup>122</sup> Mendel (2015) *Right to Information Working paper Series 3* World Bank 7.

<sup>123</sup> Right2Info: Good law and practice (2013) *Open Society Justice Initiative* [www.right2info.org](http://www.right2info.org) (accessed online 10.01.16).

information held by public bodies can be accessed; these are reactive as well as proactive disclosure.<sup>124</sup> Reactive disclosure encompasses most access to information regimes and is when individual members of the public lodge requests for and receive information.<sup>125</sup> Proactive disclosure refers to information being made public at the initiative of the public body. Greater reporting and disclosure of annual reports has improved in some nations but it is not the norm.<sup>126</sup> Studies have shown that the objectives of access laws, being generally to institute a transformation from secretive activity to transparent activity, has not yet been wholly realised as an organisational rule.<sup>127</sup>

Under stricter regimes, requesters are not entitled to inspect particular documents from certain public bodies while some government entities may decide to make only a summary of the original available.<sup>128</sup> The issue with the exclusion of certain bodies from the application of access procedures is that while some of the information held by the body may be sensitive, exclusion in entirety removes an essential oversight mechanism.<sup>129</sup> This mechanism aids in the prevention of corruption, abuse of power or the withholding of information in the public interest such as information relating to environmental hazards for example.<sup>130</sup> An improved approach may be to include all public bodies and to use exemptions from the right of access to ensure that only sensitive information is withheld where it is necessary and legitimate to do so.<sup>131</sup> A document-based regime, on the other hand, only requires the production of

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<sup>124</sup> Right2Info: Good law and practice (2013) *Open Society Justice Initiative* [www.right2info.org](http://www.right2info.org) (accessed online 10.01.16).

<sup>125</sup> Darbshire, H 'Proactive transparency: The future of the right to information, a review of standards, challenges and opportunities' (2009) *Governance working paper series* 3 Washington, DC World Bank 3-4.

<sup>126</sup> See Beierle, T. C "The benefits and costs of environmental information disclosure: What do we know about the Right-to-Know?" (2003) *Resources for the Future* 2 as well as FIPA "Proactive and reactive disclosure of government-held information in British Columbia" (2011) *The Law Foundation of British Columbia* 1-12.

<sup>127</sup> Villeneuve (2014) *Government Information Quarterly* 556.

<sup>128</sup> Right2Info 'Scope of information covered' (2013) *Open Society Justice Initiative*.

<sup>129</sup> Right2Info 'Scope of information covered' (2013) *Open Society Justice Initiative*.

<sup>130</sup> Banisar (2006) *Freedom of Information around the World: A Global Survey of Access to Government Information Laws* 21.

<sup>131</sup> Banisar (2006) *Freedom of Information around the World: A Global Survey of Access to Government Information Laws* 21-22.

existing documents with privileged information redacted.<sup>132</sup> Access regimes that implement such an approach are extremely limiting. This is particularly so given that many information requests concerning the public interest, such as the state of the environment, relate to information that is often not recorded but can indeed be found among existing government records.<sup>133</sup>

Most access to information regimes provide wide definitions for what may be classified as information or a record.<sup>134</sup> Commentators in the field assert that strict distinctions between access to information and access to documents are seldom made; emphasising that a flexible approach that grants access to both is suggested to be most effective and best serve the interests of transparency.<sup>135</sup> A majority of access regimes only require the provision of existing information currently held or controlled by information officers however a few have taken a step further to require the processing, organising or production of novel information.<sup>136</sup> As we move into an information age one may argue that it has become somewhat easier to store and provide access to certain types of information.<sup>137</sup>

Trends show that there is a limited right to access information held by private bodies in most countries.<sup>138</sup> Generally, private bodies are under no legal obligation to provide access to information resulting in laws that do not include private bodies within their scope.<sup>139</sup> This poses a serious risk to the environment where industry is concerned, as industries are largely privately

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<sup>132</sup> Right2Info 'Scope of information covered' (2013) *Open Society Justice Initiative*.

<sup>133</sup> Right2Info 'Scope of information covered' (2013) *Open Society Justice Initiative*.

<sup>134</sup> See generally Kooper *et al* "On the governance of information: Introducing a new concept of governance to support the management of information" (2011) *International Journal of Information Management* 196.

<sup>135</sup> Darbshire (2009) *Governance Working Paper Series* 3 5.

<sup>136</sup> [www.right2info.org](http://www.right2info.org) 'Scope of information covered' (2013) *Open Society Justice Initiative*.

<sup>137</sup> Haklay, M.E (2003) *Computers, Environment and Urban Systems* 27 163. See also Soma *et al* (2016) *Current Opinion in Environmental Sustainability* 18 123-124.

<sup>138</sup> Banisar (2006) *Freedom of Information around the World: A Global Survey of Access to Government Information Laws* 23.

<sup>139</sup> Banisar (2006) *Freedom of Information around the World: A Global Survey of Access to Government Information Laws* 21.

owned.<sup>140</sup> Although global trends are moving toward greater support for voluntary disclosure of environmental information in the private sector, in many cases for the purpose of competitive advantage, there is no real way to keep this information in check.<sup>141</sup> Various standards and indicators for measuring environmental performance and sustainability of private sector entities have been developed; however, these are mostly founded on regulation through incentive-based measures and thus not consistent.<sup>142</sup> Due to the lack of any legal regulatory requirement, these indicators are viewed as less reliable.<sup>143</sup>

The tendency toward encompassing private bodies into access laws where the information requested is „required for the exercise or protection of any rights“ is however increasingly being recognised.<sup>144</sup> While commentators have suggested that this is still a novel approach, attention ought to be given to the fact that laws of this nature prioritise and strengthen the protection of human rights over corporate rights.<sup>145</sup>

### 2.3.2 Limitations

Although information held by private bodies is increasingly being included in access regimes, limitations nevertheless apply. Any effective access regime

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<sup>140</sup> Cashore, B “Legitimacy and the privatization of environmental governance: How non-state market-driven governance systems gain rule-making authority” (2003) *Governance* 15(4) 507.

<sup>141</sup> De Villiers, C & van Staden, C “Where firms choose to disclose voluntary environmental information” (2011) *Journal of Accounting and Public Policy* 30(6) 508. See also Lehmann, K “Voluntary compliance measures” in Paterson & Kotze (eds) *Environmental Compliance and Enforcement in South Africa: Critical Legal Perspectives* (2008) Juta, Cape Town.

<sup>142</sup> Eng, L & Mak, Y “Corporate governance and voluntary disclosure” (2003) *Journal of Accounting and Public Policy* 22(4) 330. See also Paterson AR “An incentive-based approach to environmental regulation” in Paterson & Kotze (eds) *Environmental Compliance and Enforcement in South Africa: Critical Legal Perspectives* (2008) Juta, Cape Town for a detailed discussion of information-based incentives.

<sup>143</sup> Berthelot *et al* “Environmental disclosure research: Review and synthesis” (2003) *Journal of Accounting Literature* 22 1.

<sup>144</sup> Nayak *et al* “Recommendations for strengthening the access to information regime in the Government of Canada” (2008) *Commonwealth Human Rights Initiative* 4. See s 16(3) of the Antigua and Barbuda Freedom of Information Act of 2004 as an example.

<sup>145</sup> Nayak *et al* (2008) *Commonwealth Human Rights Initiative* 4.

contains categories of exceptions or grounds of refusal.<sup>146</sup> On the one hand, an exceedingly broad set of limitations that can severely undermine the right of access exists.<sup>147</sup> Whereas on the other hand, the importance of all legitimate confidentiality interests ought to be equally catered too; otherwise, public bodies would be required to disclose information regardless of any potentially disproportionate harm caused.<sup>148</sup> Practice shows in this regard, that access to information laws are generally undermined by unreasonably broad regimes of exceptions.<sup>149</sup> This contributes to the actual release of records being the exception rather than the norm.<sup>150</sup>

Several common categories of limitations exist in most access regimes.<sup>151</sup> These categories include protection of international relations, national security interests, privacy and confidentiality, commercial confidentiality, law enforcement and public order as well as internal records or discussions.<sup>152</sup> The literature shows that most access regimes do require a demonstration of harm before information can be legitimately withheld.<sup>153</sup> The inquiry for harm differs somewhat depending on the nature of the withheld information. Generally, in terms of public bodies, national security, the protection of internal decision-making and privacy have the highest level of protection.<sup>154</sup> Effective access regimes that contain limitations of this nature, in order to favour access, should be defined in clear and narrow terms and be subject to strict *harm* and *public interest* tests.<sup>155</sup>

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<sup>146</sup> See generally Faure, M & du Plessis, W "The balancing of interests in environmental law in Africa" (2012) *Pretoria University Law Press* 55.

<sup>147</sup> Mendel (2008) *United Nations Educational Scientific and Cultural Organization* 34.

<sup>148</sup> Banisar (2006) *Freedom of Information around the World: A Global Survey of Access to Government Information Laws* 20.

<sup>149</sup> Newman, L "Access to information: A key to democracy" (2002) *The Carter Centre* 11.

<sup>150</sup> Nealer (2005) *Journal of Public Administration* 40 (3.2) 475. See also Sand, P.H *The right to know: Environmental information disclosure by government and industry* (2002) 1-2.

<sup>151</sup> Mendel (2008) *United Nations Educational Scientific and Cultural Organization* 34.

<sup>152</sup> Banisar (2006) *Freedom of Information around the World: A Global Survey of Access to Government Information Laws* 22.

<sup>153</sup> Mendel (2015) *Right to Information Working Paper Series* 3 World Bank 10.

<sup>154</sup> See generally Crow *et al* "Public information and regulatory processes: What the public knows and regulators decide" (2016) *Review of Policy Research* 33(1) 90-94.

<sup>155</sup> Trapnell, S. E & Lemieux, V "Right to information: Identifying drivers of effectiveness in implementation" (2014) 2 *World Bank* 19.

In this regard, research shows that national laws are increasingly including provisions for access based on the public interest.<sup>156</sup> Public interest tests generally require authorities with oversight duties to balance interests between the withholding of information against the public interest in disclosure of the requested information.<sup>157</sup> This essentially permits the release of information where „it is shown that the public benefit in knowing the information offsets the harm that may be caused from its disclosure“. <sup>158</sup> Public interest provisions are usually applied where the disclosure of information would expose wrongdoing, corruption or the means with which to prevent harm to individuals or the environment.<sup>159</sup> Refusal to disclose information may not be founded on protecting public or private bodies from humiliation or the exposure of crime hence only acceptable limitations should be clearly drawn up and thus act as a deterrent.<sup>160</sup>

Notwithstanding the careful nature in which exceptions to access regimes may be constructed, there will undoubtedly be scenarios where the greater public interest is met by disclosure of the information even though harm will be caused to a protected interest.<sup>161</sup> It is impossible to draft exceptions that consider all possible overriding public interests or to pre-empt circumstances at a given time that may determine that the overall public interest is served by disclosure.<sup>162</sup> Ideally, the challenge of balancing these interests should be considered and addressed at the time laws are drafted but this is rarely the case.<sup>163</sup> In practice, laws protecting privacy are easily invoked to deny access

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<sup>156</sup> Cook, M “Balancing the public interest: Applying the public interest test to exemptions in the UK Freedom of Information Act 2000” (2003) *The Constitution Unit* 9-11 and 53-57.

<sup>157</sup> Carter, M & Bouris, A *Freedom of information: Balancing the public interest* 2ed (2006) The Constitution Unit School of Public Policy, London 1-323 and Daruwala & Nayak (2007) *Commonwealth Human Rights Initiative* 15.

<sup>158</sup> Dhaka, R.S *Right to Information and Good Governance* (2010) Concept Publishing Company Pvt. Ltd, India 48.

<sup>159</sup> Banisar (2006) *Freedom of Information around the World: A Global Survey of Access to Government Information Laws* 23.

<sup>160</sup> Mendel (2008) *United Nations Educational Scientific and Cultural Organization* 36.

<sup>161</sup> Elhauge, E “Sacrificing corporate profits in the public interest” (2005) *New York University Law Review* 80(3) 735.

<sup>162</sup> See generally Newman (2002) *The Carter Centre* 25.

<sup>163</sup> Rodrigues, C “Implementing access to information: A practical guide for operationalising access to information laws” (2008) *Commonwealth Human Rights Initiative* 13.

to information on the ground that the information is protected and thus may not be legally released.<sup>164</sup> Matters therefore often find themselves before national courts placing a great responsibility on the judiciary to assess situations on a case-by-case basis.<sup>165</sup>

### 2.3.3 Access procedures

Beyond the ideal of consistent proactive disclosure, the guarantee of the right of access to information, requires that no restrictions exist as to *who* may be able to request and receive information held by public and private bodies, subject to reasonable exceptions.<sup>166</sup> This in turn requires that clear access procedures be contained in the main access law that are not confused by any access provisions in other laws. Whilst proactive disclosure cannot always be guaranteed, clear procedures for granting access should also be set out for public and private bodies to process requests.<sup>167</sup> Although still developing, effective access to information laws have shown that the provision of a legally enforceable, straight forward and uniform mechanism for citizens to request and obtain information results in an increase in responsiveness by authorities to information requests.<sup>168</sup>

Further, public bodies are usually required by national legislation to appoint information officers and/ or an independent body to assist requesters, oversee access to information requests and to step in where necessary during appeal processes.<sup>169</sup> Although these institutional arrangements may be set up in the

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<sup>164</sup> Rodrigues (2008) *Commonwealth Human Rights Initiative* 13-14.

<sup>165</sup> See Kurukulasuriya, L "The role of the judiciary in strengthening environmental governance, the rule of law and implementation of environmental law" (2003) *Global Environmental Governance: The post-Johannesburg Agenda UNEP* 2-3.

<sup>166</sup> Mendel (2008) *United Nations Educational Scientific and Cultural Organization* 37.

<sup>167</sup> See Memeza, M "An analysis of weaknesses in access to information laws in the SADC and in developing countries" (no year) *Freedom of Expression Institute* 11  
<http://www.fx.org.za/PDFs/ATIP/ATI%20weaknesses%20analysis%20sadc1.pdf> (accessed 27.02.16).

<sup>168</sup> Daruwala, M& Nayak, V "Our rights our information: Empowering people to demand rights through knowledge" (2007) *Commonwealth Human Rights Initiative* 46.

<sup>169</sup> Banisar (2006) *Freedom of Information around the World: A Global Survey of Access to Government Information Laws* 35-36.

access law, it is possible that this will not always be realised in practice. Many nations do however have one or more bodies that provide assistance in accessing information as well as overseeing appeals.<sup>170</sup>

Access procedures for information held by private bodies is usually distinguishable from that of public bodies in the main access law. Differentiation is expressed in legal definitions and the requirements for each in meeting certain thresholds to obtain access to the relevant information.<sup>171</sup> Private bodies, as mentioned, increasingly require proof that the information sought „is required for the exercise or protection of a right“. <sup>172</sup> Some private bodies do indeed have their own information officers and voluntary disclosure procedures for accessing certain information however trends in the literature show that access procedures for private bodies in most access regimes are in no way as comprehensively catered to as public bodies are.<sup>173</sup>

Due to the broad scope of citizens that may require access to information, it is critical that access procedures are simple. A key test for the effectiveness of access laws is the simplicity, cost and speed with which people seeking information are able to obtain it.<sup>174</sup> As such, uncomplicated procedures with instructions or a manual regarding the expected process would be most useful.<sup>175</sup> Application forms should be straightforward, readily available and published in more than one language.<sup>176</sup> As far as possible, there should be no fee for the provision of information however where fees are imposed, they must not be so high that they discourage requestors.<sup>177</sup> Access laws should also provide stringent and enforceable timeframes for handling and responding

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<sup>170</sup> See for example (no author) “Citizens’ access to information in South Asia: Regional synthesis report” (2014) *The Asia Foundation* 19 [www.asiafoundation.org](http://www.asiafoundation.org) (accessed online 01.03.16).

<sup>171</sup> See Mendelson, N.A “Private control over access to the law: The perplexing federal regulatory use of private standards” (2014) *Michigan Law Review* 112 738.

<sup>172</sup> See generally Nayak *et al* (2008) *Commonwealth Human Rights Initiative* 4-5.

<sup>173</sup> Rodrigues (2008) *Commonwealth Human Rights Initiative* 15.

<sup>174</sup> See Wood, L “More than just details: Buttressing the right of access to information with information manuals” (2011) *SAJHR* 27 558-559.

<sup>175</sup> Lee & Abbot (2003) *The Modern Law Review* 66 84.

<sup>176</sup> Trapnell & Lemieux (2014) *Right to Information Working Paper Series* 2 World Bank 32.

<sup>177</sup> Daruwala & Nayak (2007) *Commonwealth Human Rights Initiative* 48.



to information requests. On average, it appears that a two to four week timeframe is the norm however, additional time may be granted if the request is extensive, complicated or requires transfer to another body that has control over the requested information.<sup>178</sup> Access to information can also be prolonged or impossible where the information seeker holds a vulnerable position within the organisation it seeks to expose. Fear regarding the outcome of the disclosure of such information, even if in the public interest, could have severe consequences for such an information seeker if not protected.<sup>179</sup>

### 2.3.4 Protection of whistle-blowers

Whistle-blowers are citizens who expose various kinds of information or activities that are illegal, unethical or incorrect within an organization that is either public or private.<sup>180</sup> For a number of decades, whistle-blowers have played key roles in sharing important information from lower levels of these organisations to higher-level officials.<sup>181</sup> The protection of whistle-blowers is therefore essential to promoting transparency and accountability in access to information regimes, whether in the main access legislation or complimentary legislation. Many human rights commentators have outlined the gravity of the need for governments to revise access to information and whistle-blower laws to enhance public interest disclosure and the flow of information.<sup>182</sup> If officials are subject to sanctions under a secrecy law, there is a high change that they may engage in a propensity to favour secrecy.<sup>183</sup> The result is that access laws have begun to provide protection for officials from liability that, in good

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<sup>178</sup> Banisar, D (2006) *Freedom of Information around the World: A Global Survey of Access to Government Information Laws* 28.

<sup>179</sup> Dhamija, S "Whistleblower policy: Time to make it mandatory" (2014) *Global Business Review* 15(4) 834-835.

<sup>180</sup> Dehn, G& Calland, R in "Whistleblowing - the state of the art: The role of the individual, organisations, the state, the media, the law and civil society" in Dehn and Calland *Whistleblowing around the World* (2004) *Public Concern at Work and Open Democracy Advice Centre* 1-3.

<sup>181</sup> Ting, M.M "Whistleblowing" (2008) *American Political Science Review* 102(2) 250.

<sup>182</sup> See Dehn, G "Whistleblowing: A practical tool in combatting corruption" *Discussion Paper for the International Conference on Anti-Corruption 20 July 2011* <http://iacconference.org/documents/whistleblowing.pdf> (accessed online 13.01.16).

<sup>183</sup> Mendel (2008) *United Nations Educational Scientific and Cultural Organization* 40.

faith, disclose information pursuant to access to information legislation.<sup>184</sup> Protection of whistle-blowers is therefore critical in changing the culture of secrecy within governments and to foster openness and transparency as the norm.<sup>185</sup> Regimes that favour open governance would benefit from the inclusion of whistle-blower protection provisions as they create a safe and acceptable environment for people to advance concerns about the illegality and corruption that may plague the organisations with which they are involved.<sup>186</sup>

Protection of whistle-blowers can have far-reaching effects and is therefore essential in all public and private organisations inclusive of all actors within the environmental governance regime.<sup>187</sup> Honest officials that are cornered by employment contracts, public service rules or that function without legal protection through which to advance concerns are often legally unable or too intimidated to disclose information.<sup>188</sup> Whistle-blower protection provisions should therefore be designed to incentivize and thereby encourage the reporting of official wrongdoing and provide safety from any subsequent persecution.<sup>189</sup> Legislation of this nature encourages accountability within organisations, maintains public confidence and encourages responsible management and communication practices.<sup>190</sup>

Although relatively few studies offer international or comparative perspectives on whistle-blower protection, governments, organisations and various

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<sup>184</sup> Ayagre, P & Aidoo-Buameh, J "Whistleblower reward and systems implementation effects on whistleblowing in organisations" (2014) *European Journal of Accounting Auditing and Finance Research* 2(1) 87.

<sup>185</sup> Dehn, G "Whistleblowing: A new perspective" (2001) *Public Concern at Work* London <http://iacconference.org/documents/cs60a.pdf> (accessed online 13.01.16).

<sup>186</sup> Faunce, T "Three Australian whistleblowing saga: Lessons for internal and external regulation" (2004) *Medical Journal of Australia* 44-45.

<sup>187</sup> Rodrigues, C (2008) *Commonwealth Human Rights Initiative* 15.

<sup>188</sup> Cho, Y.J and Song, H.J "Determinants of whistleblowing within government agencies" (2015) *Public Personnel Management* 44(4) 450-452.

<sup>189</sup> Dworkin, T. M & Near, J.P "A better statutory approach to whistle-blowing" (1997) *Business Ethics Quarterly* 7(1) 2-3.

<sup>190</sup> Banisar *Freedom of Information around the World: A Global Survey of Access to Government Information Laws* 26.

international development agencies recognise effective reporting tools such as whistleblowing.<sup>191</sup> Trends show that the improvement of information flow regarding wrongdoing by governments and private organisations substantially increased recognition of whistleblowing in national legal frameworks and policy.<sup>192</sup> Increased recognition usually follows large-scale misconduct, such as an oil spill or pollution of underground water sources, which although affects certain nations more than others, could be argued to have great temporary influence and is therefore not consistent.<sup>193</sup> Several countries have however promulgated whistle-blower legislation as a way of addressing the misconduct whilst others have similarly implemented whistleblowing systems that reward and therefore encourage whistleblowing.<sup>194</sup>

A few commentators have interestingly suggested that where legislation fails, the most effective means for collective and voluntary whistle-blower protection could be the implementation of codes of conduct.<sup>195</sup> Where competitive advantage for non-compliance with environmental indicators is removed, organisational cooperation reduces the costs of compliance thereby simply promoting the sharing of information in the public domain so that cooperation and transparency overcome the need for penalisation.<sup>196</sup>

### 2.3.5 Appeal and review

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<sup>191</sup> Ayagre & Aidoo-Buameh (2014) *European Journal of Accounting Auditing and Finance Research* 2(1) 80. See also Isa, K. D "Combating Fraud in Africa: The role of whistle-blowers" (2009) *DSM Business Review* 1(1).

<sup>192</sup> Apaza, C & Chang, Y "What makes whistleblowing effective: Whistleblowing in Peru and South Korea" (2011) *Public Integrity* 13(2) 114-115.

<sup>193</sup> See Fletcher, H "Corporate transparency in the fight against corruption" (2003) *Global Corruption Report* 35-37 for a detailed discussion regarding the corruption and secrecy involved in the oil industry, particularly in Nigeria. See also Etimire, U "Public access to environmental information: A comparative analysis of Nigerian legislation with international best practice" (2014) *Transnational Environmental Law* 3(1) 149-172.

<sup>194</sup> Ayagre, P & Aidoo-Buameh, J (2014) *European Journal of Accounting Auditing and Finance Research* 2(1) 80.

<sup>195</sup> Caillier, J. G "Transformational leadership and whistle-blowing attitudes: Is this relationship mediated by organizational commitment and public service motivation?" (2015) *American Review of Public Administration* 45(4) 458-459.

<sup>196</sup> Fletcher, H "Corporate transparency in the fight against corruption" (2003) *Global Corruption Report* 35.

A variety of mechanisms for the appeal and review of decisions regarding access requests for publicly and privately held information exist in access laws.<sup>197</sup> These include internal appeals, administrative and judicial reviews as well as enforcement or oversight by independent bodies.<sup>198</sup> The availability and effectiveness of these recourse methods does however vary greatly.<sup>199</sup> In terms of public bodies, access regime trends generally establish that failure to respond to requests in the prescribed manner, or any refusal by a public body to disclose information should be subject to some form of appeal mechanism.<sup>200</sup> Most national laws therefore provide for an internal appeal or review by a higher ranking or independent authority within the body to which the initial request was submitted.<sup>201</sup> Internal appeals enable the confrontation of errors and boost morale among lower ranking officials to disclose information and ensure internal consistency.<sup>202</sup> Practically, however, internal mechanisms within both public and private bodies, have had mixed outcomes.<sup>203</sup> It can be a quick and cost effective way to appeal or review an outcome but experience in other access regimes shows that internal appeal mechanisms often rather than enhancing access tend to uphold refusals and result in further postponements.<sup>204</sup>

Commentators emphasise that it is crucial that mechanisms for appeal to an independent body be available to oversee decisions made by public bodies.<sup>205</sup> Without appeal mechanisms, individuals would merely have their requests considered with no recourse or access to administrative justice as guaranteed

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<sup>197</sup> See Shapiro, M "Appeal" (1980) *Law and Society* 14 629-630.

<sup>198</sup> Banisar (2006) *Freedom of Information around the World: A Global Survey of Access to Government Information Laws* 23.

<sup>199</sup> Lemieux *et al* (2015) *JeDEM* 7(2) 85.

<sup>200</sup> Banisar, D "Freedom of information and access to government record laws around the world" (2004) *The Freedominfo.org Global Survey* 5-6.

<sup>201</sup> Mendel (2008) *United Nations Educational Scientific and Cultural Organization* 37.

<sup>202</sup> Cowan, D and Halliday, S *The Appeal of Internal Appeal* (2003) Hart Publishing, Oxford and Portland.

<sup>203</sup> Mendel (2008) *United Nations Educational Scientific and Cultural Organization* 38.

<sup>204</sup> Banisar, D (2006) *Freedom of Information around the World: A Global Survey of Access to Government Information Laws* 23. See Lemieux *et al* (2015) *JeDEM* 7(2) 84-88 for a comparative study on appeal mechanisms in eight countries.

<sup>205</sup> See Rodrigues, C (2008) *Commonwealth Human Rights Initiative* 8-9 and Arko-Cobbah (2007) *IFLA* 3.

by other rights. Generally, once internal appeals are exhausted as far as available, requesters may then seek external assistance from an independent body.<sup>206</sup> An information commission, ombudsman or the courts may provide independent review.<sup>207</sup> Ombudsmen generally do not have the power to produce binding decisions but most countries do consider their opinions influential.<sup>208</sup> In some countries, information commissions are created and overseen by fellow government departments or they could be a completely independent body.<sup>209</sup> Without independent review, information regarding corruption, environmental hazards or other illegal activities, may never be exposed. Further, whilst some countries are satisfied with one oversight body, others prefer the use of both independent commissions as well as the courts.<sup>210</sup> Commentators suggest that independent commissions are more effective than the courts in responding to appeals, as they are swifter and more affordable in accessing information.<sup>211</sup> Most progressive access regimes provide for independent commissions, many of which have successful records of accomplishment that encourage requesters to approach them before the courts.<sup>212</sup>

The use of judicial review as an oversight mechanism in accessing information is usually reserved for complex or serious matters unless it is the only mandated avenue for external oversight.<sup>213</sup> Although alternatives that are more effective may exist, courts often have the main legal authority to set standards

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<sup>206</sup> Banisar (2006) *Freedom of Information around the World: A Global Survey of Access to Government Information Laws* 11.

<sup>207</sup> Arko-Cobbah (2007) *IFLA* 3.

<sup>208</sup> Rowat, D.C "The new private-sector ombudsmen" (2003) *Options Politiques* 46-48. See also Varuhas, J "Governmental rejections of ombudsmen findings: What role for the courts?" (2009) *The Modern Law Review* 72(1) 91-115 for a better understanding of the role of the ombudsmen.

<sup>209</sup> See Banisar, D & Davies, S "Global trends in privacy protection: An international survey of privacy, data protection and surveillance laws and developments" (1999) *John Marshall Journal of Computer & Information Law* 18 (1) 16.

<sup>210</sup> Varuhas (2009) *The Modern Law Review* 72(1) 100.

<sup>211</sup> Daruwala & Nayak "Our rights our information: Empowering people to demand rights through knowledge" (2007) *Commonwealth Human Rights Initiative* 49.

<sup>212</sup> Banisar (2006) *Freedom of Information around the World: A Global Survey of Access to Government Information Laws* 23.

<sup>213</sup> Mossop, D "Judicial review: Guidebooks for representing yourself in Supreme Court civil matters" (2010) *Community Legal Assistance Society* 2.

in controversial matters and generally ensure fully reasoned and binding decisions to challenging disclosure issues.<sup>214</sup>

Effective access regimes should therefore provide for substantive written explanations from the body administering or refusing to administer information.<sup>215</sup> Written reasons provide the requestor with sufficient information upon which to base his or her appeal. The explanation should also include information and simple guidelines regarding the procedure for filing the appeal or review.<sup>216</sup> Further, the independent and impartial body chosen to review decisions should be given the legal mandate to impose penalties on guilty officials and award compensation to information requesters that suffer some or other loss due to unreasonable refusals.<sup>217</sup> Review provisions in access regimes should also include permissible sanctions such as fines or imprisonment. Without sanctions to deter public bodies who fail to comply with their duties, access to information laws become weak.<sup>218</sup>

## **Chapter Three: A Critical Review of the South African Regime**

### **3.1 Brief Overview of South Africa's Access to Information Regime**

Although many access to information cases have gone before South African courts, there are still relatively few considering that PAIA was promulgated nearly 20 years ago, this is particularly so in the environmental context.<sup>219</sup> Commentators therefore emphasize that there is ample scope for further

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<sup>214</sup> See Hoexter, *C Administrative Law in South Africa* (2007) Juta & Co Ltd Cape Town, Chapters 3 and 8.

<sup>215</sup> Mendel (2008) *United Nations Educational Scientific and Cultural Organization* 37-38.

<sup>216</sup> Daruwala & Nayak (2007) *Commonwealth Human Rights Initiative* 49.

<sup>217</sup> See for example The Public Law Project "An introduction to judicial review" (no year) *Short Guide 3 Public Law Project* 1-16.

<sup>218</sup> See Hoexter *Administrative Law in South Africa* Chapter 3 and Ssonko, D "Ethics, accountability, transparency, integrity and professionalism in the public service: The case of Uganda" (2010) Presentation paper, *Uganda Management Institute*.

<sup>219</sup> CER "Barricading the doors: Instead of improving access to environmental information, public and private bodies try to use the law to avoid disclosure" (2013) *Open Society Foundation of South Africa* 4.

litigation that establishes stable and authoritative interpretations of access to environmental information using PAIA.<sup>220</sup> Chapter 3 therefore engages a blended discussion and overview of applicable legislation, cases relevant to access to environmental information as well as a comparison, using the same five essential elements as set out in Chapter 2, to critically review South Africa's existing access to environmental information regime.

### 3.1.1 The Constitution

The abysmal events of South Africa's past were committed in a culture of secrecy aided by the lack of an effective access to information regime.<sup>221</sup> The government under the new democratic dispensation therefore wanted to transform South African society.<sup>222</sup> The Constitution<sup>223</sup> was therefore promulgated and introduced the right of access to information held by both public and private bodies.<sup>224</sup> It further placed a duty on the state to actively ensure that every requester be granted access to information within the boundaries of the relevant limitations.<sup>225</sup> As such, PAIA was drafted along with its associated *PAIA Regulations*<sup>226</sup> in order to give effect to the right of access to information.<sup>227</sup>

Since PAIA's inception, a significant shift toward openness and accountability in South Africa's legal framework of relevance to access to environmental information and governance has been noted.<sup>228</sup> Given the role that

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<sup>220</sup> Klaaren, J "PAIA through the courts: Case law and important developments in PAIA litigation" (2010) *Open Democracy Advice Centre* 6-7.

<sup>221</sup> Calland *Paper Wars: Access to Information in South Africa* 1-4.

<sup>222</sup> Van der Walt, R "Access to Information: Information Disclosure in some South African organisations" (2007) *South African Journal of Business Management* 38(1) 25.

<sup>223</sup> Act No 108 of 1996.

<sup>224</sup> Constitution, s 32.

<sup>225</sup> Constitution, s 32(1).

<sup>226</sup> GNR223 in GG No. 22125, dated 9 March 2001.

<sup>227</sup> PAIA, s 32(2).

<sup>228</sup> Calland, R "Illuminating the politics and the practice of access to information in South Africa" in Allan *Paper Wars Access to Information in South Africa* (2009) Wits University Press, 1-3. See also Du Plessis, W (2009) "Access to Information" in Paterson and Kotze (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) Juta & Company (Pty) LTD Cape Town 197.

government secrecy played in the past, it is vital that the right of access to information is realised in all aspects of society<sup>229</sup> and assists in the realisation of other rights, such as the environmental right,<sup>230</sup> to which everyone is entitled.<sup>231</sup> The explicitly articulated right of access to information places South Africa among a small minority of nations that attributes such a great level of importance to this right.<sup>232</sup> It is clear that the drafters of the Constitution<sup>233</sup> intended to push boundaries by also providing for a right of access to information held by private bodies as far as this information is required to prosecute or protect another right.<sup>234</sup> PAIA, as a result, is promoted as one of the most liberal access to information laws in the world.<sup>235</sup>

The importance of the right, which ties in closely to administrative justice, is noted in the *Aquafund*.<sup>236</sup> case. The court held that if:

“..every person is entitled to lawful administrative action, it must follow that in a legal culture of accountability and transparency [that] a person must be entitled to such information as is reasonably required to determine whether his or her right to lawful administrative action has been infringed”.<sup>237</sup>

Therefore, where a citizen is unable to establish whether rights are violated, he or she will undoubtedly be prejudiced.<sup>238</sup> The right of access to environmental

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<sup>229</sup> Johannessen *et al* “A motivation for legislation on access to information” (1995) *South African Law Journal* 112, 47. See also Klaaren, J& Penfold, G “Access to Information” in Woolman and Bishop (eds) *Constitutional Law of South Africa* (2002) 62-63.

<sup>230</sup> Constitution, s 24.

<sup>231</sup> Van Heerden *et al* “The constitutionality of statutory limitation to the right of access to information held by the state in South Africa” (2014) *Speculum Juris* 1 27.

<sup>232</sup> Peekhaus, W “South Africa’s Promotion of Access to Information Act: An Analysis of Relevant Jurisprudence” (2014) *Journal of Information Policy* 4 571.

<sup>233</sup> Constitution, 1996.

<sup>234</sup> Peekhaus (2014) *Journal of Information Policy* 4 570.

<sup>235</sup> Arko-Cobbah (2007) *IFLA Journal* 1-4.

<sup>236</sup> *Aquafund (Pty) Ltd v Premier of the Western Cape* 1997 (7) BCLR 907 (C).

<sup>237</sup> Para 916E.

<sup>238</sup> Kotze LJ “The application of just administrative action in the South African environmental governance sphere: An Analysis of some contemporary thoughts and recent jurisprudence” (2004) *PER* 7(2) 60.



information specifically, was central in the *Biowatch*<sup>239</sup> case. The court held that the constitutional right of access to information is intended to promote the facilitation of transparent and accountable government and that while it is not absolute; all organs of state in terms of the Constitution<sup>240</sup> are obliged „to respect, protect, promote and fulfil this right in addition to the other rights in the Bill of Rights“.<sup>241</sup> When members of the public assert the right of access to information, this changes the balance of power between the State and ordinary citizens and enables the pursuit of social, environmental and economic justice.<sup>242</sup>

### 3.1.2 Promotion of Access to Information Act

As set out in its preamble, PAIA intends to „foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information“.<sup>243</sup> It does so by promoting that citizens have „effective access to information“ to enable them to more fully „exercise and protect all of their rights“,<sup>244</sup> inclusive of the environmental right. PAIA proclaims that its objectives include helping „to facilitate the constitutional obligations of the State“, „to promote a culture of human rights and social justice“ and „to enhance the transparency, accountability and good governance of both public and private bodies“.<sup>245</sup> PAIA has several parts and includes, for both public and private bodies, provisions relating to the right of access,<sup>246</sup> publication and availability of certain records,<sup>247</sup> manner of access,<sup>248</sup> grounds of refusal<sup>249</sup> as

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<sup>239</sup> 2009 (6) SA 232 (CC).

<sup>240</sup> Constitution, s 7(2).

<sup>241</sup> 2009 (6) SA 232 (CC) 45.

<sup>242</sup> O'Connor (2012) *South African History Archive* 6.

<sup>243</sup> PAIA, Preamble.

<sup>244</sup> PAIA, Preamble.

<sup>245</sup> PAIA, Preamble and s 9. See also Volmink, P “Enhancing transparency within public sector procurement: The South African experience” (no year) *Paper for The International Public Procurement Conference* 2-34.

<sup>246</sup> PAIA, s 11-13 (public bodies) and s 50 (private bodies).

<sup>247</sup> PAIA, s 14-16 (public bodies) and s 51-52 (private bodies).

<sup>248</sup> PAIA, s 17-32 (public bodies) and s 53-61 (private bodies).

<sup>249</sup> PAIA, s 33-46 (public bodies) and s 62-70 (private bodies).

well as third party notification and intervention.<sup>250</sup> It then sets out provisions regarding appeals against decisions,<sup>251</sup> the designation and role of the Human Rights Commission<sup>252</sup> as well as provisions relating to liability and offences<sup>253</sup> and the promulgation of regulations<sup>254</sup>.

PAIA is applicable to the exclusion of provisions in other laws that limit the disclosure of a record of a public or private body<sup>255</sup> or is materially inconsistent with an object or particular provision of PAIA.<sup>256</sup> Any restrictions placed on PAIA are therefore the only substantive restrictions on the right that may be applied.<sup>257</sup> Certain immaterial limitations in other laws that are widely consistent with PAIA, such as procedures for gaining access to information, may however still to apply.<sup>258</sup> However, whilst PAIA is the main law that provides for limitations on the right of access, its provisions are not a substitute for provisions in any other legislation that provides for access to information.<sup>259</sup>

### 3.1.3 National Environmental Management Act

NEMA is South Africa's primary environmental management framework law that gives effect to the environmental right contained in the Constitution.<sup>260</sup> NEMA was promulgated two years prior to PAIA and initially contained provisions for access to environmental information. These were however repealed in order to avoid the creation of a parallel system of access.<sup>261</sup> The

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<sup>250</sup> PAIA, s 47-49 (public bodies) and s 71-73 (private bodies).

<sup>251</sup> PAIA, s 74-82.

<sup>252</sup> PAIA, s 83-85.

<sup>253</sup> PAIA, s 89-90.

<sup>254</sup> PAIA, s 92.

<sup>255</sup> PAIA, s 5(a).

<sup>256</sup> PAIA, s 5(b).

<sup>257</sup> O'Connor (2012) *South African History Archive* 10.

<sup>258</sup> PAIA, s 5(b).

<sup>259</sup> PAIA, s 6 and s 86. See O'Connor (2012) *South African History Archive* 10.

<sup>260</sup> Constitution, s 24.

<sup>261</sup> National Environmental Laws Amendment Act 14 of 2009 GN 627 in GG No. 32276, s 14 repealed by s 31(1)-31(3).

provisions that remain relate to the protection of whistle-blowers and are elaborated on in Part 2 of Chapter 3.<sup>262</sup>

NEMA provides a number of environmental principles that must inform all actions wherever the environment is concerned.<sup>263</sup> NEMA provides that „all interested and affected parties must be able to participate in environmental governance and have the opportunity to develop the necessary capacity for achieving equitable and effective participation“ and that „vulnerable and disadvantaged persons“ must be particularly protected.<sup>264</sup> NEMA further provides that decisions in the environmental context must consider the „values, interests and the needs of all interested and affected parties“ including the recognition of „all forms of knowledge“ such as traditional and ordinary knowledge.<sup>265</sup> NEMA promotes „community wellbeing and empowerment through environmental education, raising environmental awareness and the sharing of knowledge and experience“. <sup>266</sup> Importantly, regarding access to environmental information, NEMA also provides that „decisions must be taken in an open and transparent manner“ and that „access to information must be provided in accordance with the law“. <sup>267</sup>

Additionally, some of South Africa’s other environmental laws specifically provide for the disclosure of relevant environmental information.<sup>268</sup> Regarding the general state of the environment and government performance, NEMA compels the Minister of Environmental Affairs and Tourism to publish an *Annual Performance Report on Sustainable Development* that ought to set out the environmental performance of all spheres of government.<sup>269</sup> Environmental reporting of this nature is also mandated in specific environmental sectors. For

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<sup>262</sup> NEMA, s 31.

<sup>263</sup> NEMA, s 2.

<sup>264</sup> NEMA, s 2(4)(f).

<sup>265</sup> NEMA, s 2(4)(g). See also Du Plessis (2008) *PER/PELJ* 11(2) 186.

<sup>266</sup> NEMA, s 2(4)(h).

<sup>267</sup> NEMA, s 2(4)(k).

<sup>268</sup> Du Plessis (2009) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 200.

<sup>269</sup> NEMA, s 26(2).

example, in the water resources sector, the Minister is compelled to establish national information systems regarding water resources „in order to store and provide information for the protection and sustainable use and management of water resources”.<sup>270</sup> The information system may include „a hydrological information system”, „a water resource quality and ground water information system” as well as „a register of water use authorisations”.<sup>271</sup> In the biodiversity sector, the Minister is required to make all information relating to South Africa’s international biodiversity obligations available to the public.<sup>272</sup> Further, all government departments, within the domestic context, that have been compelled to prepare environmental implementation plans and environmental management plans under NEMA, must publish these in the *Government Gazette*.<sup>273</sup>

Other mechanisms that facilitate public access to environmental information are written into permitting and authorisation procedures applicable to listed activities under various environmental laws; this may also include the publishing of details in the public domain for comment.<sup>274</sup> The most rigorous example thereof would be the environmental impact assessment requirements under NEMA.<sup>275</sup> Provisions for a register of interested and affected parties and public participation is additionally required at various stages of the application process.<sup>276</sup> Further, obligations to publish information encompass the implementation of relevant planning frameworks, authorisations and management strategies as well as draft environmental regulations, norms and standards prescribed under environmental laws.<sup>277</sup> These are generally published in the *Government Gazette* for public comment and occasionally elsewhere in the public domain.

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<sup>270</sup> NWA, s 139(1) and s 140.

<sup>271</sup> NWA, s 139 (1) (a)-(d).

<sup>272</sup> NEM: Biodiversity Act 10 of 2004, s 59 (e).

<sup>273</sup> NEMA, s 11-16.

<sup>274</sup> Du Plessis (2009) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 200.

<sup>275</sup> NEMA, s 24.

<sup>276</sup> See also NEMA: *Environmental Impact Assessment Regulations* GNR 982 in GG No. 38282 on 4 December 2014.

<sup>277</sup> See the Environment Conservation Act 73 of 1989 (s 32); NEMA (s 47); NEM: Biodiversity Act (ss9 and 100); NEM: Air Quality Act (s 57); NEM: Protected Areas Act 57 of 2003 (s 86(3)) for examples.

### 3.2 Critical Review of South Africa's Relevant Legal Framework and Jurisprudence

#### 3.2.1 Scope and nature of information

A critical review of the nature and scope of PAIA requires a consideration of the nature of requesters, the nature of bodies to which requests are submitted, the nature of the information that sought as well as any other applicable parameters. PAIA functions as an overarching, broad information-based access law that appears to facilitate mostly the reactive disclosure of information.<sup>278</sup> As such, majority of PAIA encompasses how requesters should go about applying for access to information; rather than how to penalize bodies that have not already made the information public. PAIA provides that *anyone* may apply for access to information held by public *and* private bodies.<sup>279</sup> As such, a requester may be a „natural person, a juristic person or a person acting on behalf of a natural or juristic person“.<sup>280</sup>

Information requesters may submit applications for access to public and private bodies.<sup>281</sup> PAIA defines a *private body* as „a natural or legal person or partnership that conducts (or has conducted) any trade, business or profession“.<sup>282</sup> A *public body* is defined to include „national and provincial departments and municipalities“, as well as „any functionary or institution exercising a power or performing a duty in terms of the Constitution or a provincial constitution“, or „exercising a public power or performing a public function in terms of any legislation“.<sup>283</sup> This definition must be read alongside other PAIA provisions that state that entities may be considered either a public

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<sup>278</sup> CER (2015) *Open Society Foundation for South Africa* 4.

<sup>279</sup> PAIA, s 11 (public bodies) and s 50 (private bodies).

<sup>280</sup> PAIA, s 1.

<sup>281</sup> PAIA, s 11 (public bodies) and s 50 (private bodies).

<sup>282</sup> PAIA, s 1.

<sup>283</sup> PAIA, s 1.

or a private body depending on the record in question.<sup>284</sup> For purposes of PAIA therefore, an entity may in one scenario, be a public body and in another scenario be a private body.<sup>285</sup> The outcome in each case depends on whether the relevant record relates to the exercise of a power or performance of a function as a public body or private body.<sup>286</sup>

The court in the *Institute for Democracy in South Africa*<sup>287</sup> (*IDASA*) case suggested in this regard that „the definition of public body is a fluid one and that the division between the categories of public and private bodies is not impermeable“.<sup>288</sup> Further, it is recognised by PAIA that entities can perform both private and public functions at different times and that they may hold information relating to both aspects of their performance.<sup>289</sup> Information sought by requesters can therefore relate to a power exercised or a function performed as a public body<sup>290</sup> or they can relate to a power exercised or a function performed as a private body.<sup>291</sup>

Due to the sometimes-blurred *public* versus *private* distinction, there have been various disputes between record holders and those seeking access to information under PAIA.<sup>292</sup> In suggesting how to ascertain which provisions apply in the event of ambiguity the court in *IDASA*<sup>293</sup> suggested that one might consider the source, nature, and subject matter of the power being exercised by the body and whether the exercise of that power is consistent with a public duty.<sup>294</sup> The court further identified several applicable tests that establish whether records created by private bodies may be subject to the public body

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<sup>284</sup> PAIA, s 8.

<sup>285</sup> O'Connor (2012) *South African History Archive* 12.

<sup>286</sup> Peekhaus (2014) *Journal of Information Policy* 575.

<sup>287</sup> *Institute for Democracy in South Africa and Others v African National Congress and Others* 2005 (5) SA 39 (C).

<sup>288</sup> Para 49.

<sup>289</sup> PAIA, Part 2 and Part 3.

<sup>290</sup> PAIA, Part 2.

<sup>291</sup> PAIA, Part 3. See also *M & G Limited and Others v 2010 FIFA World Cup Organising Committee South Africa Limited and Another* 2011 (5) SA 163 (GSJ).

<sup>292</sup> Peekhaus (2014) *Journal of Information Policy* 576.

<sup>293</sup> 2005 (5) SA 39 (C).

<sup>294</sup> Para 45.

provisions of PAIA.<sup>295</sup> The court in the *MittalSteel South Africa Ltd*<sup>296</sup> case asserted that the *control test* is „useful in a scenario when it is necessary to determine whether functions, which by their nature might as well be private functions, are performed under the control of the State and are thereby turned into public functions instead“.<sup>297</sup> As cited in the *IDASA*<sup>298</sup> case, „...this converts a body like a trading entity, normally a private body, into a public body for the time and to the extent that it carries out public functions“.<sup>299</sup>

The PAIA definition of a public body indicates an emphasis on the public nature of the function or power being emphasized.<sup>300</sup> Thus, there may be circumstances in which the control test is not suitable for determining whether an entity should be construed as a public or private body for purposes of access under PAIA.<sup>301</sup> A good example is the increased privatization of public amenities and utilities, which has resulted in private bodies performing what, are traditionally government functions, without being subject to oversight by any sphere of government.<sup>302</sup> This independence from control may then require that an entity be properly classified based on a *function test* instead of a control test.<sup>303</sup>

Once the requester has distinguished between whether the entity holding the required information is public or private, it is necessary to determine whether the information can be requested under PAIA.<sup>304</sup> The requester is expected to clearly decipher what information is required following the relevant access procedures.<sup>305</sup> Importantly, the right of access to information held by both

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<sup>295</sup> Para 45.

<sup>296</sup> *MittalSteel South Africa Ltd v Hlatshwayo* 2007 1 SA 66 (SCA).

<sup>297</sup> Para 19.

<sup>298</sup> 2005 (5) SA 39 (C).

<sup>299</sup> Para 19. See also *M & G Limited and Others v 2010 FIFA World Cup Organising Committee South Africa Limited and Another* 2011 (5) SA 163 (GSJ).

<sup>300</sup> PAIA, s 1.

<sup>301</sup> Peekhaus *Journal of Information Policy* 575.

<sup>302</sup> Gupta, A& Mason, M “Disclosing or obscuring? The politics of transparency in global climate governance” (2016) *Current Opinion in Environmental Sustainability* 18 86.

<sup>303</sup> 2007 (1) SA 66 (SCA) 21.

<sup>304</sup> PAIA, s 1.

<sup>305</sup> PAIA, s 11 (public bodies) and s 50 (private bodies).

public and private bodies is delimited to access to „records“.<sup>306</sup> As such „records“ are defined by PAIA as „recorded information, regardless of form or medium, in the possession or under the control of the relevant body, whether or not it was created by that body“.<sup>307</sup> Records also „include records in the possession or under the control of an official of a public or private body in that capacity or an independent contractor engaged by such a body in the capacity as such“.<sup>308</sup> In the environmental context, as discussed, the accepted broad definition has, encompassed a variety of environmental information, such as data sets, maps, reports, plans, programmes as well as applications and authorisations.<sup>309</sup>

From the outset, PAIA exceeds the essential element of a widely scoped and broad ranging access regime as set out in Chapter 2. The inclusion of provisions that provide for access to privately held information ensure that its effectiveness ranks above the access regimes of many other nations. In South Africa, the gathering of information from public and private bodies is done in a number of ways. Sometimes information is released proactively, either on the entities own accord or in terms of a legislative obligation. Information of this nature is in the public domain and is freely accessible and useable in the realm of compliance and enforcement as well as public interest litigation.<sup>310</sup>

Information that is released voluntarily and without request should enable public and private enforcers to understand the broad environmental and regulatory context in which they function. In this regard, PAIA states that public bodies *may* voluntarily release information but *must*, on an annual basis, release a list of categories of information that is automatically available to the public via publication in the *Government Gazette*.<sup>311</sup> PAIA further requires information officers of public bodies to submit annual reports to the Human Rights Commission, the PAIA oversight body, containing statistical

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<sup>306</sup> PAIA, s 1.

<sup>307</sup> PAIA, s 1.

<sup>308</sup> PAIA, s 1.

<sup>309</sup> See generally ICO Guidance “What is environmental information?” (2009) *Environmental Information Regulations* 3.

<sup>310</sup> Du Plessis *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 198-199.

<sup>311</sup> PAIA, s 15 and s 52.



informational including the number of requests received, requests granted, refusals as well as information regarding internal appeals.<sup>312</sup>

Private bodies *may* also release annual information however, they are not statutorily obliged to do so and thus it is voluntary.<sup>313</sup> In the conducting of certain activities that affect the environment, sectoral environmental laws may however require the release of certain information to the public or to government for purposes of acquiring an authorisation for example. In terms of industry, most often private bodies, it is well known that environmental performance information is important for investors to assess the worth and future projections of businesses and the costs of pollution control.<sup>314</sup> Further, regulators and the public are likely to assess the industry's performance by using environmental information that emphasizes the crucial need to include private bodies within the ambit of access regimes as PAIA does. Due to the likelihood of adversarial reactions by different stakeholders, private companies have incentives to disclose environmental information in a tactical fashion.<sup>315</sup> When not legally obliged, the quality and reliability of the information produced cannot always be deemed as trustworthy.<sup>316</sup> According to recent reports, many South African companies that are regularly applauded as fine examples for their approach to managing environmental, social and governance matters have in fact committed serious breaches of environmental laws and misrepresented these to their shareholders.<sup>317</sup>

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<sup>312</sup> PAIA, s 32.

<sup>313</sup> PAIA, s 52.

<sup>314</sup> Bewley, K & Li Y "The disclosure of environmental information by Canadian manufacturing companies: A voluntary disclosure" (2000) *Advances in Environmental Accounting & Management* 1 202. See also Ellis, P & Desouza, K, "On information management, environmental sustainability, and cradle to grave mentalities: A relationship framework" (2009) *Business Information Review* 26(4) 258-259.

<sup>315</sup> Hassan, A & Ibrahim, E "Corporate environmental information disclosure: Factors influencing companies' success in attaining environmental awards" (2011) *Corporate Social Responsibility and Environmental Management* 19(1) 34-35.

<sup>316</sup> D'Souza *et al* "Environmentally motivated actions influencing perceptions of environmental corporate reputation" (2013) *Journal of Strategic Marketing* 21(6) 542-543.

<sup>317</sup> CER "Full disclosure: The truth about corporate environmental compliance in South Africa" (2015) *Centre for Environmental Rights* 5.

As such, it is likely that crucial environmental information may not exist in the public domain and therefore must be specifically requested using PAIA.<sup>318</sup> The difficulty in requesting specific information was central in the *Biowatch*<sup>319</sup> case. A main objective of Biowatch, a non-profit entity established to enhance conservation efforts, is „to monitor the implementation of South Africa’s obligations to ensure protection and sustainable use of biodiversity“.<sup>320</sup> In doing so, Biowatch began to target the permitting system for field trials and the commercial release of genetically modified crops. The resultant genetically modified organisms (GMOs) contain new combinations of genes that could present a host of environmental and other risks that would not have occurred but for their genetic enhancements.<sup>321</sup> The exact information regarding potential impacts was unknown to Biowatch that then sought access to a range of records from the relevant department. After receiving unsatisfactory responses, Biowatch sent a final letter of demand to the Registrar of Genetic Resources to request access to eleven categories of information.<sup>322</sup> Biowatch was subsequently scrutinised by the courts for submitting a „vague“ and „catch-all“ request that did not reflect the exact information it sought.<sup>323</sup> This „fishing expedition“ in the lower courts unfortunately had far reaching consequences in terms of the cost orders issued by the courts and the overall precedent set for public interest litigants.<sup>324</sup> In the *De Lange*<sup>325</sup> case, the importance of narrowly defined access requests was also highlighted as an appropriate method of ascertaining particular records.<sup>326</sup> The courts in the *De Lange*<sup>327</sup> and *Biowatch*<sup>328</sup> judgments therefore offer guidance to future requesters by emphasising the importance of specific requests in the success of their applications despite this being an often-impossible task.

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<sup>318</sup> Peekhaus (2011) *Government Information Quarterly* 544.

<sup>319</sup> 2009 (6) SA 232 (CC).

<sup>320</sup> Eastwood, J “The Biowatch case: A victory for access to information and a landmark decision on costs awards in public litigation” (2012) *Biowatch Research Papers* 1 5.

<sup>321</sup> Eastwood (2012) *Biowatch Research Papers* 1 6.

<sup>322</sup> 2009 (6) SA 232 (CC) 43.

<sup>323</sup> Para 43.

<sup>324</sup> Para 33.

<sup>325</sup> *De Lange and another v Eskom Holdings Limited and others* 2012 (5) BCLR 502 (GSJ).

<sup>326</sup> Para 7.

<sup>327</sup> 2012 (5) BCLR 502 (GSJ).

<sup>328</sup> 2009 (6) SA 232 (CC).

The significant role played by information officers in assisting requesters to determine what information they seek was highlighted in Chapter 2 as an effective mechanism to facilitate effective access. As such, PAIA places an obligation on public bodies to facilitate and assist requesters in framing their requests.<sup>329</sup> In line with these provisions, the Registrar was also reprimanded by the courts for his inactive approach in responding to requests for information by Biowatch.<sup>330</sup> The Constitutional Court concurred and this was a consideration in its decision to award costs against the Registrar.<sup>331</sup> It is hoped that a clear message sent by the court will prompt and incentivise the state to fulfil its constitutional and statutory obligations to avoid expensive litigation.<sup>332</sup> In terms of industry (private bodies), although many companies remain secretive, the courts are increasingly encouraging their obligation to publicly report on environmental impacts so that they may assist requesters in holding them to account where members of society and the natural functioning of the environment are effected.<sup>333</sup>

Additionally, in terms of obligations incumbent on the state, it has also been confirmed by the courts that PAIA is applicable to records of public and private bodies regardless of when the record came into existence; meaning that information generated before the promulgation of PAIA for example, is still within its scope.<sup>334</sup>

PAIA generally meets the broad scope of access promoted in Chapter 2 however there are exclusions. PAIA is not applicable to certain government officials such as cabinet ministers and committees, members of parliament or of the provincial legislature as well as the judiciary.<sup>335</sup> These exclusions remove a critical oversight role from the public and the courts as they exclude

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<sup>329</sup> PAIA, s 19.

<sup>330</sup> *Trustees, Biowatch Trust v Registrar: Genetic Resources & Others* 2005 (2) SA 111 (T) 43 and 66.

<sup>331</sup> Para 41.

<sup>332</sup> Humby, T "The Biowatch case: Major advance in South African law of costs and access to environmental justice" (2010) *Journal of Environmental Law* 22(1) 134.

<sup>333</sup> CER (2015) *Open Society Foundation for South Africa* 7.

<sup>334</sup> PAIA, s 3.

<sup>335</sup> PAIA, s 12.

requesters from gaining access to valuable information. As suggested in Chapter 2, transparency would be better promoted in line with constitutional rights<sup>336</sup> and NEMA<sup>337</sup> if there were no excluded bodies under PAIA, but rather more narrowly drawn exceptions to accessing certain sensitive information. From this assessment, it is clear that the courts face a number of challenges in adjudicating upon disputes regarding access to information held by both public and private bodies. In addition, they also have to interpret and adjudicate on the applicability of grounds of refusal to access such records. The right of access to information is thus not only limited by a balancing of rights within the Constitution, but also statutorily.

### 3.2.2 Limitations

Unrestricted access to environmental information is not possible because the law must also protect other interests. These limitations are broad ranging and differ somewhat in terms of public and private bodies. In Chapter 2, the most commonly used limitations in access regimes were set out as favouring national security, commercial interests and confidentiality and South Africa shares this practice.<sup>338</sup> PAIA and its underlying constitutional obligations are thus characterized by a balancing of the individual right to receive information to enforce other rights, against the interest in maintaining secrecy and the confidentiality that is often associated with corporate rights.<sup>339</sup> The courts place a considerable weight on the right of access to environmental information and have shown in several cases that the right will only be curtailed when strictly necessary.<sup>340</sup> The inclusion of grounds for refusal to

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<sup>336</sup> Constitution, s 24.

<sup>337</sup> NEMA, s 2(4)(k).

<sup>338</sup> *Moules Environmental Judicial Review* 347.

<sup>339</sup> Banisar (2006) *Freedom of Information around the World: A Global Survey of Access to Government Information Laws* 20.

<sup>340</sup> See generally *Company Secretary of ArcelorMittal South Africa and Another v Vaal Environmental Justice Alliance* 2014 (1) SA 515 (SCA) 66-77.

access information nonetheless significantly increases the potential for conflict to arise.<sup>341</sup>

The *Biowatch*<sup>342</sup> case confirms that fashioning a balance between the dictates of openness and accountability on the one hand, and confidentiality on the other, will be a difficult task.<sup>343</sup> The realisation of this balance may then be subject to the judicial interpretation of the delineation of the grounds of refusal set out in PAIA. As such, the courts are tasked with being particularly cautious in undertaking to ensure that the grounds of refusal are not abused as tools for undermining the imperatives of openness, transparency and environmental protection as promoted by the Constitution.<sup>344</sup>

PAIA includes mandatory and discretionary grounds for both public and private bodies to refuse access to information requests.<sup>345</sup> Mandatory exemptions require that the information officer or head of the body must refuse access to certain requested records.<sup>346</sup> Discretionary exemptions provide the information officer or head of the body with some flexibility in deciding whether to apply the exemption, so long as the discretion is exercised lawfully and reasonably.<sup>347</sup> Mandatory and discretionary exemptions can however be challenged on appeal or review by requesters where the grounds for refusal are believed not to weigh up to the purpose for which the particular exemption was set.<sup>348</sup>

As held in *Biowatch*<sup>349</sup> the duty of the head of a public or private body when applying a ground of refusal intended to protect the interests of a third party is to „...act as impartial steward, and not to align itself either with those who had

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<sup>341</sup> See generally Kidd (2013) *PER* 13(5) 29.

<sup>342</sup> 2009 (6) SA 232 (CC).

<sup>343</sup> 2009 (6) SA 232 (CC) 28.

<sup>344</sup> Du Plessis *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 217.

<sup>345</sup> PAIA Part 2, Chapter 4 (public bodies) and Part 3, Chapter 4 (private bodies).

<sup>346</sup> O'Connor (2012) *South African History Archive* 30.

<sup>347</sup> O'Connor (2012) *South African History Archive* 30.

<sup>348</sup> PAIA, s 74.

<sup>349</sup> 2009 (6) SA 232 (CC). See also *Transnet Limited v SA Machinery Company (Pty) Ltd* 2005 SA 113 (SCA) 40-42.

furnished the information or with parties seeking access to it".<sup>350</sup> PAIA also states that more than one ground for refusal may apply to a single record.<sup>351</sup> PAIA therefore requires that the interpretation of the relationship between the grounds for refusal be independent and without reference to, or limitation by, the other grounds for refusal.<sup>352</sup> Information officers or heads of bodies must accept the difficult role of independently ascertaining whether to refuse information and further if refused, whether or not a particular consequence or environmental harm would follow such disclosure.<sup>353</sup>

There are several specific grounds for refusal contained in PAIA however only a handful are commonly used in response to requests for access to environmental information.<sup>354</sup> These grounds include personal information of third parties,<sup>355</sup> commercial information (of third parties and of information holders)<sup>356</sup> as well as confidential information.<sup>357</sup> Examples of some of the other grounds of refusal covered by PAIA include defence, security, and international relations;<sup>358</sup> protection of police dockets, law enforcement and legal proceedings;<sup>359</sup> legally privileged records;<sup>360</sup> manifestly frivolous or vexatious requests, or substantial and unreasonable diversion of resources<sup>361</sup> as well as protection of research information.<sup>362</sup> Each ground for refusal contains its own requirements and exclusions; the application of which occurs on a case-by-case basis.

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<sup>350</sup> Para 45.

<sup>351</sup> PAIA, s 33(2) (b) (public bodies) and s 62(b) (private bodies).

<sup>352</sup> PAIA, s 30(2) (1) (public bodies) and s 62(a) (private bodies).

<sup>353</sup> O'Connor (2012) *South African History Archive* 30.

<sup>354</sup> Etimire (2012) *Environmental Law Review* 140.

<sup>355</sup> PAIA, s 37 (public bodies) and s 63 (private bodies).

<sup>356</sup> PAIA, s 36 (public bodies) and s 64 (private bodies).

<sup>357</sup> PAIA, s 37 (public bodies) and s 65 (private bodies).

<sup>358</sup> PAIA, s 41.

<sup>359</sup> PAIA, s 39.

<sup>360</sup> PAIA, s 40 (public bodies) and s 67 (private bodies).

<sup>361</sup> PAIA, s 45. See also Kravchenko, S and Bonnie, J *Human Rights and the Environment: Cases, Law and Policy* (2008) Carolina Academic Press, North Carolina: Chapter 6 221.

<sup>362</sup> PAIA, s 43 (public bodies) and s 69 (private bodies).

Although reliance on more than one ground of refusal is common in South African cases, recent reports show that the protection of commercial interests of third parties (usually big industry) in access to environmental information cases is most common and controversial before the courts and in the media.<sup>363</sup> The purpose of a refusal based on the protection of commercial interests is to keep secret the skill or expertise of a business especially in situations where if a competitor gained access to it, the business would be at a disadvantage.<sup>364</sup> It includes trade secrets, financial, commercial, scientific or technical information and information supplied in confidence.<sup>365</sup> As demonstrated in the *De Lange*<sup>366</sup> case for example, the onus rests on the body to which the information request was submitted to prove that harm would be caused to commercial interests if the relevant information were disclosed.<sup>367</sup> The *Earthlife*<sup>368</sup> case is an earlier illustration of the resilient protection of commercial information offered by the courts in the environmental context. In this case, the court found that plans, financing provisions and technical reports regarding progress on the research and development of a Pebble Bed Modular Reactor (PBMR) constituted trade secrets and confidential information resulting in non-disclosure.<sup>369</sup>

Also included in PAIAs provisions are certain exclusions that provide for public safety interests.<sup>370</sup> Commercially sensitive information protecting corporate rights logically cannot prevail over serious public safety interests. PAIA states that the results of „any product, environmental testing or other investigation supplied by a third party“ or „the result of any such testing or investigation

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<sup>363</sup> CER “Money talks: Commercial interests and transparency in environmental governance” (2014) *Open Society Foundation for South Africa* 3.

<sup>364</sup> Saeidi *et al* “How does corporate social responsibility contribute to firm financial performance? The mediating role of competitive advantage, reputation and customer satisfaction” (2015) *Journal of Business Research* 68(2) 344. See generally Munnik, V (2012) “Discursive power and environmental justice in the new South Africa: The Steel Valley struggle against pollution” PHD Thesis, University of Witwatersrand.

<sup>365</sup> PAIA, s 36(1) (public bodies) and s 64(1) (private bodies). See also *Conservation South Africa (CSA) v The Director General: Department of Mineral Resources & Others* (WCC) 3599/14 (unreported).

<sup>366</sup> *De Lange and another v Eskom Holdings Limited and others* 2012 (5) BCLR 502 (GSJ).

<sup>367</sup> Para 85.

<sup>368</sup> 2005 (3) SA 156 (C).

<sup>369</sup> Para 78-82.

<sup>370</sup> PAIA, s 36(2) (public bodies) and s 64(2) (private bodies).

carried out by or on behalf of a third party where the disclosure of the information would reveal a serious public safety or environmental risk" will not be protected by commercial grounds of refusal.<sup>371</sup> As defined by PAIA, *public safety* or *environmental risk* mean „harm or risk to the environment or the public" associated with, for example, „a substance released into the environment, including the workplace or a substance intended for human or animal consumption".<sup>372</sup> As such, these provisions have great potential for the protection of the environment. In addition, PAIA provides for severability.<sup>373</sup> Severability requires that before refusal to provide access to a record, the relevant body must ascertain whether separation of the requested information and provision in redacted form is possible.<sup>374</sup> Although not always immediately helpful, the provision of at least some information may assist in clarifying requests for other environmental information.

As with any effective access regime, the last exception from refusal provided for by PAIA, is the public interest override.<sup>375</sup> Used in very particular circumstances, this provision states „that even where a ground for refusing access to a record exists, the public interest in certain information is paramount".<sup>376</sup> Upon fulfilment of the public interest override test, release of the record is obligatory, regardless of an applicable ground for refusal.<sup>377</sup> As set out in *Centre for Social Accountability*,<sup>378</sup> the test considers whether the „disclosure of the record would reveal evidence of either a substantial contravention of, or failure to comply with the law or an imminent and serious public safety or environmental risk".<sup>379</sup> The court pronounced that „...to place the threshold any higher would undermine the constitutional right to information and may call into question the constitutionality of the entire

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<sup>371</sup> PAIA, s 36(2) (public bodies) and s 64(2) (private bodies).

<sup>372</sup> PAIA, s 1.

<sup>373</sup> PAIA, s 45.

<sup>374</sup> PAIA, s 45.

<sup>375</sup> PAIA, s 28 (public bodies) and s 59 (private bodies).

<sup>376</sup> O'Connor (2012) *South African History Archive* 40.

<sup>377</sup> O'Connor (2012) *South African History Archive* 40-41.

<sup>378</sup> *Centre for Social Accountability v Secretary of Parliament and Others* 2011 (5) SA 279 (ECG).

<sup>379</sup> Para 86.



structure of PAIA or at least the section".<sup>380</sup> In order to fulfil one of these tests, the harm contemplated in the relevant ground for refusal must follow in order for the public interest override to apply.<sup>381</sup> The consideration and weighing up of interests should occur on a case-by-case basis.<sup>382</sup>

The recent *De Lange*<sup>383</sup> case considered these provisions where the court granted access to records exposing contracts for the supply of electricity that it found would otherwise be exempt under PAIA as confidential information based on the public interest override.<sup>384</sup> The court believed that disclosure „would reveal evidence of an imminent and serious public safety and environmental risk“ because the absence of electricity supply „would lead to the use of unhealthy and unsafe alternatives“.<sup>385</sup> The alternatives, such as „coal fired stoves or braziers in households“, are obvious health and environmental dangers and have a high potential to result in „disease, job loss, protest action and even death“.<sup>386</sup> This case demonstrates the courts willingness to apply PAIA provisions that will enable the disclosure of confidential information of third parties where it is necessary to do so for the public interest.

Over all in terms of the essential legal element of limitations to access, it appears that PAIA follows common trends to that of other effective access regimes in its applicable grounds for refusal, for both public and private bodies. Although protection of commercial information as a ground for refusal is frequently used, interpretation by the courts shows that it will not as frequently be accepted where there is evidence that proves otherwise.<sup>387</sup> The dissertation now turns to an examination of how requesters ought to go about gaining access to environmental information under PAIA.

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<sup>380</sup> Para 90.

<sup>381</sup> PAIA, s 28 (public bodies) and s 59 (private bodies).

<sup>382</sup> Du Plessis *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 217.

<sup>383</sup> *De Lange and another v Eskom Holdings Limited and others* 2012 (5) BCLR 502 (GSJ).

<sup>384</sup> Para 166.

<sup>385</sup> Para 149-150.

<sup>386</sup> 2012 (5) BCLR 502 (GSJ) 151.

<sup>387</sup> CER (2014) *Open Society Foundation for South Africa* 3-4.

### 3.2.3 Access procedures

Although South Africa does not offer a guarantee of access to environmental information, PAIA does on the face of it, provide clearly set out procedures for accessing information from both public and private bodies.<sup>388</sup> In South Africa, although provided for by PAIA,<sup>389</sup> many public bodies do not have functional, transparent and accountable information officers in each department.<sup>390</sup>

Recent reports by environmental interest groups show that most government officials charged with being information officers often do not act solely in this capacity with the result being that the role is not being taken seriously, or overseen by an adequately informed or skilled official on how to use PAIA in responding to requests.<sup>391</sup> Further, consistent reports in the media depict a situation where particular departments are repeat offenders in falling short of their legislated requirements and are regularly using the provisions of PAIA to escape disclosure of environmental information.<sup>392</sup> Further, private bodies mostly act voluntarily and with minimal oversight and are usually only called to book when whistle-blowers bring issues into the public eye.<sup>393</sup>

In line with the trends outlined in Chapter 2 for effective access regimes, the distinction between access procedures for information held by public and private bodies is critical. PAIA provides for a clear distinction between the two.<sup>394</sup> This is evident due to PAIA's provision of powerful legislative rights of access to information held by both public *and* private bodies, and secondly due to the obligations that attach to the former being far more stringent than

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<sup>388</sup> PAIA, s 11 (public bodies) and s 50 (private bodies).

<sup>389</sup> PAIA, s 17.

<sup>390</sup> CER (2012) *Open Society Foundation for South Africa* 6.

<sup>391</sup> Neuman & Calland (2007) *The Right to Know* 19.

<sup>392</sup> See Kings, S "Access to environment information is being blocked, reveals report" (4 March 2013) *Mail & Guardian* and Krause, R "Mining plans ignore affected people" (18 February 2016) *Business Day Live*.

<sup>393</sup> CER (2013) *Open Society Foundation of South Africa* 1-2.

<sup>394</sup> PAIA, s 11 (public bodies) and s 50 (private bodies).

for the latter.<sup>395</sup> As highlighted, the unqualified right to access publicly held information does not encompass records under the control of private bodies. An extra qualification, namely that private bodies are subject to access requests only in the case of records „required for the exercise or protection of any rights“, is set out.<sup>396</sup> Although the purpose of an additional threshold may hold its own merits, the reality for many ordinary South Africans is that it poses an additional burden on the ability of citizens to enforce their rights efficiently.<sup>397</sup> According to the *Cape Metropolitan Council*<sup>398</sup> case, an applicant must state what the right is that he or she wishes to protect or exercise, what the information is that is required and how that information would assist him or her in exercising or protecting that right.<sup>399</sup>

The courts have refined the interpretation of the qualification *required for the exercise or protection of any rights* to mean *reasonably required* so long as that qualification is understood to connote a „substantial advantage“ or an „element of need“. <sup>400</sup> For a requested record to meet the required threshold, a requester must first demonstrate a connection between the information requested and the exercise or protection of the relevant right.<sup>401</sup> An access request to a private body must therefore be specific and be founded on an element of need that is linked to any other right contained in the Constitution or legislation.<sup>402</sup> This interpretation of the term *require* in PAIA has however been argued to „set the bar impossibly high [...] and made requesters nervous about litigating against private bodies“. <sup>403</sup>

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<sup>395</sup> PAIA, s 50 (1)(a).

<sup>396</sup> PAIA, s 50(1)(a).

<sup>397</sup> Allan, K "Applying PAIA: Legal, Political and Contextual Issues" in *Allen Paper Wars: Access to Information in South Africa* (2009) Wits University Press, Johannesburg 149.

<sup>398</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA).

<sup>399</sup> Para 28.

<sup>400</sup> *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) 13.

<sup>401</sup> Glazewski *Environmental Law in South Africa* (2005). See also judgment by Brand JA in *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA).

<sup>402</sup> Peekhaus (2014) *Journal of International Policy* 580.

<sup>403</sup> *Allen Paper Wars: Access to Information in South Africa* (2009) 149.

The courts have acknowledged that in most cases where ordinary citizens approach the court, they are not aware of the exact content they seek to access.<sup>404</sup> A requester cannot be expected to easily demonstrate a link between the record and the rights implicated with any degree of accuracy.<sup>405</sup> In this regard, it was shown before the courts that there should be caution against a too restrictive approach of the term „required“. The threshold for the requirement of „need“ or „substantial advantage“ with regard to proving a connection between the information sought and the protection or enforcement of a right ought „not to be set too high that otherwise the principal purpose of PAIA will be frustrated“.<sup>406</sup> The interpretation of the threshold must enable access to information, enhance, and promote the exercise and protection of rights.<sup>407</sup>

In *the VEJA*<sup>408</sup> case, the courts took a step forward in the achievement of constitutional transparency and ordered a major industrial polluter, ArcelorMittal South Africa Ltd (ArcelorMittal), to disclose records pertaining to pollution in the areas surrounding its steel operation plants.<sup>409</sup> VEJA, an advocate for environmental justice, was determined that information regarding levels of pollution and its effect on the environment were not publicly accessible and asserted that the information sought in relation to pollution was required for it to establish that there are no environmental risks as claimed by ArcelorMittal.<sup>410</sup> VEJA therefore argued, in line with PAIA, that it required access to information held by ArcelorMittal in order to exercise or protect its right to a healthy environment.<sup>411</sup> The court did not accept ArcelorMittal's claim that VEJA, in seeking the information, was setting itself up as a „parallel regulating authority“.<sup>412</sup> The court in response provided an in depth analysis of

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<sup>404</sup> 2009 (6) SA 232 (CC) 43.

<sup>405</sup> Currie, I & De Waal, J *The Bill of Rights Handbook* 6ed (2013) Juta & Co Ltd Cape 29-71.

<sup>406</sup> *M&G Media Ltd and Others v 2010 FIFA World Cup Organising Committee South Africa Ltd. and Another* 2011 (5) SA 163 (GSJ) 355.

<sup>407</sup> Para 355.

<sup>408</sup> 2015 1 SA 515 (SCA).

<sup>409</sup> Para 85.

<sup>410</sup> Para 21.

<sup>411</sup> PAIA, s 50.

<sup>412</sup> 2015 1 SA 515 (SCA) 38.

the right of access to information held by private bodies under PAIA and fully supported VEJA in its attempt to exercise and protect its environmental rights.<sup>413</sup> Then courts agreed that a refusal of VEJA's application would hamper the organisation in campaigning the preservation and protection of the environment.<sup>414</sup> The court further cited the *Biowatch*<sup>415</sup> case where it concluded that it „has clearly been established that the participation of public interest groups is vital for the protection of the environment“.<sup>416</sup>

Other access procedures in PAIA stipulate that requests for information to both private and public bodies must be made by paying the required fee (where applicable), using the prescribed forms<sup>417</sup> and submitting them to the relevant information officer or head of the body.<sup>418</sup> Additionally, the PAIA Regulations<sup>419</sup> provide templates for the forms to which requests for access to records must correspond. Both public and certain private bodies are under an obligation to publish manuals to assist requesters in lodging applications for access to environmental information therefore aiding the application process for requesters.<sup>420</sup> The necessity for requestors to comply with the procedures set out in PAIA when seeking access to information has been confirmed by the courts and failure to do so may result in delays or without access to the environmental information sought.<sup>421</sup>

Requests for information from public bodies do not require any reason or justification for the request. Therefore as confirmed by the courts, once a requester has complied with the procedural requirements for access and overcome any grounds for refusal as set out in PAIA, he or she must grant

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<sup>413</sup> PAIA, s 50.

<sup>414</sup> 2015 1 SA 515 (SCA) 52.

<sup>415</sup> 2009 (6) SA 232 (CC) 19.

<sup>416</sup> 2015 1 SA 515 (SCA) 42.

<sup>417</sup> PAIA, s 22(1) (public bodies) and s 54(1) (private bodies).

<sup>418</sup> PAIA, s 18 (public bodies) and s 53 (private bodies).

<sup>419</sup> GNR 440 in GG No. 23119 dated 15 February 2002.

<sup>420</sup> PAIA, s 14 (public bodies) and s 51 (private bodies).

<sup>421</sup> See generally *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* 2007 (3) All SA 318 (SCA).

access.<sup>422</sup> As confirmed by the courts, the presumption of PAIA is in favour of access to publicly held information and not the exception.<sup>423</sup>

PAIA provides a 30-day timeframe, beginning from the submission of a request for information, for the information officer to act.<sup>424</sup> Where the requested record contains information relating to a third party thereby obliging the public or private body to notify the third party, the 30-day timeframe for responding to a request starts from the date of informing the third party.<sup>425</sup> Under particular circumstances, public and private bodies may extend the period for responding to a request for no more than 30 days.<sup>426</sup> Further, a deemed refusal of a request for information under PAIA may be assumed if the request has not been responded to within the relevant timeframe.<sup>427</sup> Although helpful in avoiding request backlogs, the provision for a deemed refusal has shown to have disappointingly resulted in appeals being treated as initial requests.<sup>428</sup> Following a deemed refusal, the requester may then invoke the internal appeal mechanism or court procedures where applicable.<sup>429</sup>

The access procedures encompassed by PAIA demonstrate a broad and flexible regime within which to apply for access to environmental information. PAIA provides for the relevant procedures, specific thresholds, assistance and guidance manuals, timeframes as well as fees and forms applicable to requests for information.<sup>430</sup> As such, PAIA caters to the requirements of an effective access regime as set out in Chapter 2. The courts in environmental information matters appear also to support the application of the environmental right as grounds for access to information held by private bodies, even where it is unclear what exactly the information sought may be. In other situations,

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<sup>422</sup> See *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA).

<sup>423</sup> *President of the Republic of South Africa and Others v M&G Media Ltd* 2012 (2) SA 50 (CC) 9.

<sup>424</sup> PAIA, s 25.

<sup>425</sup> PAIA, s 49(1) (public bodies) and s 73(1) (private bodies).

<sup>426</sup> PAIA, s 26 (public bodies) and s 57 (private bodies).

<sup>427</sup> PAIA, s 27 (public bodies) and s 58 (private bodies).

<sup>428</sup> CER (2015) *Open Society Foundation for South Africa* 3.

<sup>429</sup> PAIA, s 74-82.

<sup>430</sup> PAIA, s 11 (public bodies) and s 50 (private bodies).

where useful information is stored or used in the requesters work or other close vicinity, the exact information required may be too close for comfort. The dissertation now turns to a critical assessment of the provisions for the protection of whistle-blowers as applicable to the access to environmental information regime.

### 3.2.4 Protection of whistle-blowers

The right of access to information, as set out in Chapter 2, is not absolute and may be restricted in certain circumstances due to various legislated exemptions and limitations. Protection is therefore available to holders of such information who disclose information that may affect the protected interests of another or reveal the wrongdoing of another.<sup>431</sup> Protection of whistle-blowers in South Africa is essentially to bar prosecution or dismissal of those who disclose information. The provision for the mandatory and voluntary disclosure of environmental information, with or without request, may not prove sufficient for fostering the culture of openness and transparency necessary for effective environmental governance in South Africa.<sup>432</sup> A possible reason is that all too frequently only those deeply imbedded within an organisation have knowledge of, or access to, relevant information relating to the environmental performance of the organisation.<sup>433</sup> Those people may understandably fear victimisation or dismissal and as a result may favour secrecy. As such, legislation exists to provide legal protection for whistle-blowers.<sup>434</sup>

Protection of whistle-blowers is available under both NEMA and the Protected Disclosures Act<sup>435</sup> (PDA).<sup>436</sup> NEMA provides for the protection of „any person

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<sup>431</sup> Razzano, G “Empowering our whistleblowers” (2014) *Open Democracy Advice Centre* 1.

<sup>432</sup> Du Plessis *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 198.

<sup>433</sup> See Rothschild, J “The fate of whistleblowers in nonprofit organisations” (2013) *Nonprofit and Voluntary Sector Quarterly* 42 886-901.

<sup>434</sup> Malunga, K “Whistle-blowing in South Africa: Empowering whistleblowers in South Africa- dealing with intimidation and strengthening people and institutions” (2015) *Launch of the anti-intimidation and ethical practices forum Public Prosecutor South Africa* 8.

<sup>435</sup> Act 26 of 2000.

<sup>436</sup> Du Plessis *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 198.

who makes a disclosure in the reasonable belief that he or she is providing evidence relating to an environmental risk".<sup>437</sup> NEMA further states that information must be disclosed to certain entities in order to ensure protection. These entities include „a committee of Parliament or a provincial legislature; an organ of state dealing with the protection of the environment or emergency services; the Public Protector, the Human Rights Commission; or a member of the National Prosecuting Authority".<sup>438</sup> NEMA additionally provides protection for information provided to the news broadcasting media.<sup>439</sup> This protection will only be afforded if: „the person reasonably believes at the time of disclosure the release of the information is necessary to, avert an imminent and serious threat to the environment, to ensure that the harm is timeously addressed or to protect him or herself against reprisals, or giving due weight to the importance of open, accountable and participatory administration, that the public interest in disclosure of the information clearly outweighed any need for non-disclosure".<sup>440</sup>

Further, NEMA provides that no person may promise any sort of advantage to, or action against, a whistle-blower to prevent him or her reporting the matter.<sup>441</sup> If a whistle-blower uses the procedures set out in NEMA, he or she „may not be held civilly or criminally liable, or be dismissed, disciplined, prejudiced or harassed".<sup>442</sup> An additional useful principle encompassed by NEMA in this regard is the recognition of „the right of workers to refuse work that is harmful to their health or the environment" and the „right to be informed of dangers must be protected and respected".<sup>443</sup>

Although PAIA does not specifically provide for the protection of whistle-blowers, it does promote the proactive disclosure of information and provides

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<sup>437</sup> NEMA, s 31(4).

<sup>438</sup> NEMA, s 31(5)(a).

<sup>439</sup> NEMA, s 31(5)(b).

<sup>440</sup> NEMA, s 31(5)(b).

<sup>441</sup> NEMA, s 31(7)-(8).

<sup>442</sup> NEMA, s 31(4).

<sup>443</sup> NEMA, s 2(4)(j).



the provisions necessary to respond to requests for reactive disclosure.<sup>444</sup>

Further, there is similarity between the PAIA public interest override provisions<sup>445</sup> and the whistleblowing provisions in NEMA.<sup>446</sup> They both weigh up competing interests emphasising the creation of a legislative environment that seeks to create supporting mechanisms to advance good environmental governance, with the public interest at the core.<sup>447</sup>

Compared to NEMA, the applicability of the PDA is much narrower in that it only deals with the disclosure by employees regarding the conduct of their employers.<sup>448</sup> In this regard, an employee may for example, disclose information under the PDA where he or she has reason to believe that a criminal offence has been committed,<sup>449</sup> a person has failed to comply with a legal obligation,<sup>450</sup> the health or safety of an individual is likely to be endangered;<sup>451</sup> or the environment is, or is going to be, damaged.<sup>452</sup> The person who makes the „protected disclosure“ may not be subjected to, among other things, disciplinary actions, dismissal, suspension, demotion, harassment or intimidation.<sup>453</sup>

Further, the publication of the Protected Disclosures Amendment Bill<sup>454</sup> (PDAB) may further expand the reach of the PDA. The PDAB seeks to amend the PDA to extend the application of the Act to persons who work for the state or in a third party capacity through the rendering of services for example.<sup>455</sup> The potential value of employees coming forward and raising concerns over

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<sup>444</sup> PAIA, s 11 (public bodies) and s 50 (private bodies).

<sup>445</sup> PAIA, s 46 (public bodies) and s 70 (private bodies).

<sup>446</sup> NEMA, s 31.

<sup>447</sup> Razzano (2014) *Open Democracy Advice Centre* 20-21.

<sup>448</sup> Du Plessis *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 218. See also Rothschild (2013) *Nonprofit and Voluntary Sector Quarterly* 42 886-888.

<sup>449</sup> PDA, s 1(a).

<sup>450</sup> PDA, s 1(b).

<sup>451</sup> PDA, s 1(d).

<sup>452</sup> PDA, s 1(e).

<sup>453</sup> S 1 read with s 6-9.

<sup>454</sup> Protected Disclosures Act (Act 26 of 200): Publication of Explanatory Summary of the Protected Disclosures Amendment Bill GN 703 in GG No. 39479 of 4 December 2015.

<sup>455</sup> GN 703 in GG No. 39479 of 4 December 2015 1.

irregular conduct of third parties is great, especially where services that affect the environment are rendered. Investigation into supposed maladministration has often revealed that employees were either aware of the issue or had raised concerns that had been ignored.<sup>456</sup> The cost of this silence in terms of for example, the environmental harm, public health and the public purse can be extremely high.<sup>457</sup>

As set out above, the benefits of disclosure, in both NEMA and the PDA, must clearly outweigh the need for non-disclosure in order to be effective and are thus only applicable in grave situations. Although the legal protection afforded to whistle-blowers under the above laws is clear and seemingly comprehensive, the act of whistleblowing is still somewhat taboo in South Africa.<sup>458</sup> Cases of victimisation following disclosure are still prevalent and frequently disguised in different forms.<sup>459</sup> It therefore seems that until the public perception of whistle-blowers improves and appropriate sanctions put in place to penalise those who seek to act outside of the law, these helpful provisions for facilitating the disclosure of information regarding environmental offences will essentially remain on paper.<sup>460</sup> Extended protection under the PDAB could therefore prove useful, together with the provisions in PAIA and NEMA, in facilitating access to environmental information held by both public and private bodies as it has the potential to broaden the scope significantly. The dissertation now turns to a review of the last essential legal element of any effective access regime.

### 3.2.5 Appeal and review

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<sup>456</sup> Razzano (2014) *Open Democracy Advice Centre* 5.

<sup>457</sup> See Holtzhausen, N *Whistle blowing and whistle blower protection in the South African public sector* Doctorate of Literature and Philosophy in Public Administration, University of South Africa (2007) 3.

<sup>458</sup> Malunga (2015) *Launch of the anti-intimidation and ethical practices forum* Public Prosecutor South Africa 1-4.

<sup>459</sup> De Maria, W "Whistleblower protection: is Africa ready?" (2005) *Public Administration and Development* 25(3) 218-219.

<sup>460</sup> Du Plessis *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 219.

In line with the essential legal elements of an effective access regime set out in Chapter 2, the South African access to information regime provides mechanisms for appeal and review. As such, where an applicant is unsatisfied with the outcome of a request for environmental information, these mechanisms apply.<sup>461</sup> PAIA sets out provisions for internal appeal against decisions of information officers of certain public bodies as well as applications to court against the decisions of information officers, relevant authorities of public bodies or heads of private bodies.<sup>462</sup> PAIA prescribes particular procedures and guidelines for requesters of environmental information to follow.<sup>463</sup>

The first point of call for requesters against a decision of a public body, are the procedures for lodging an internal appeal.<sup>464</sup> A requester or a third party is entitled to, within 60 days; apply for an internal appeal against a decision of an information officer of a public body.<sup>465</sup> Requesters may appeal decisions for various reasons. For example, according to PAIA, a requester „may lodge an appeal against a decision to refuse access to a record“,<sup>466</sup> „to extend the timeframe for responding to a request“,<sup>467</sup> „to charge a request fee“<sup>468</sup> or against „the amount of a fee payable or the format in which the information was granted“. <sup>469</sup> The PAIA Regulations<sup>470</sup> prescribe the template for all forms and detail the fees relevant to all requests as well as internal appeals.<sup>471</sup> The information officer must submit the internal appeal and reasons therefore to the relevant authority within 10 working days after receipt of the appeal from the requester.<sup>472</sup> If the appeal concerns a decision to refuse or grant access to a record where a third party may be affected, the information officer must also

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<sup>461</sup> PAIA, s 74.

<sup>462</sup> PAIA, s 74 (public bodies) and s 78 (private bodies).

<sup>463</sup> PAIA, s 74-82.

<sup>464</sup> PAIA, s 74.

<sup>465</sup> PAIA, s 74 (public bodies) and s 75 (private bodies).

<sup>466</sup> PAIA, s 74 (1)(a).

<sup>467</sup> PAIA, s 74 (1)(b) read with s 26.

<sup>468</sup> PAIA, s 74(1)(b) read with s 22.

<sup>469</sup> PAIA, s 74 (1)(b) read with s 29(3).

<sup>470</sup> GNR223 in GG No. 22125, 9 March 2001.

<sup>471</sup> GNR223 in GG No. 22125, 9 March 2001, Reg 6 and 7 in terms of PAIA, s 75(1).

<sup>472</sup> PAIA, s 75(4).

submit the names and contact information of the third parties to the relevant authority.<sup>473</sup>

The responsible information officer or relevant authority of the public body then considers and determines the outcome of the internal appeal.<sup>474</sup> Once determined, the relevant authority may confirm the original decision or may substitute it with a new one.<sup>475</sup> The relevant authority must give due regard to a number of factors before coming to a decision in this regard.<sup>476</sup> These factors include the grounds for the internal appeal,<sup>477</sup> the reasons for the original decision submitted by the information officer,<sup>478</sup> any representations made by the third party or in the case of an appeal lodged by the third party,<sup>479</sup> any representations made by the requester.<sup>480</sup> The relevant authority must inform the requester of his or her decision immediately after its conclusion<sup>481</sup> however, PAIA prescribes a 30-day timeframe for notification.<sup>482</sup> If the relevant authority does not inform the requester of the outcome within the mandated period, a requester may assume the dismissal of the appeal entitling the requester to make an application to court.<sup>483</sup> If the relevant authority does grant access to the record on appeal notification to a third party is not required, immediate access should be granted to the requester.<sup>484</sup> If notification to a third party is required, the relevant authority must give the requester access 30 days after the third party is notified, except if a court application has been lodged.<sup>485</sup>

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<sup>473</sup> PAIA, s 75.

<sup>474</sup> PAIA, s 77.

<sup>475</sup> PAIA, s 77(2)

<sup>476</sup> PAIA, s 77(1).

<sup>477</sup> PAIA, s 77(1)(a).

<sup>478</sup> PAIA, s 77(1)(b).

<sup>479</sup> PAIA, s 77(1)(c).

<sup>480</sup> PAIA, s 77(1)(d).

<sup>481</sup> PAIA, s 77(4) and (5).

<sup>482</sup> PAIA, s 77(3).

<sup>483</sup> PAIA, s 77(7).

<sup>484</sup> PAIA, s 77(6)(a).

<sup>485</sup> PAIA, s 77(6)(b).

The right of internal appeal contained in PAIA is only applicable to decisions made by the *first* category of public bodies, namely national and provincial departments and municipalities, and as such is not available to other functionaries or intuitions.<sup>486</sup> PAIA prescribes that the right to appeal a decision of other categories of public bodies and private bodies is limited to the right of judicial review.<sup>487</sup> As illustrated in the *Biowatch*<sup>488</sup> case, an acceptable defence against Biowatch would have been that it had not exhausted all internal remedies before approaching the court for review. Since proceedings began prior to the commencement of PAIA, the court held that because PAIA is not retrospective Biowatch did not need to adhere to the internal appeal procedures.<sup>489</sup> Further, because PAIA only makes provision for an internal appeal against a „public body“, it was held that the Registrar and relevant council in the case were „clearly not public bodies“ of the kind contemplated in the first category of public bodies.<sup>490</sup> The court went on to emphasize that the Registrar could rather be classified as a public body „exercising a public power or performing a public function in terms of any legislation“. <sup>491</sup> It then held that this meant that „the mandatory internal appeal procedure provided for in section 74, read with section 78(1) of PAIA finds no application in respect of Biowatch’s requests“. <sup>492</sup> If the internal appeal provisions had been applicable, Biowatch would have had to take a step back in order to follow internal appeal procedures and then return to court to seek relief if the exhaustion of those remedies had failed. This exercise would have cost Biowatch plenty time and money and as such should be a lesson nonetheless for future requesters. Namely, to exhaust all internal remedies before approaching the court.

Once all internal remedies applicable to certain bodies have been exhausted, requesters may apply in terms of PAIA, for a review of a decision by the

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<sup>486</sup> PAIA, s 74(1) read with s 1.

<sup>487</sup> PAIA, s 74.

<sup>488</sup> 2005 (4) SA 111 (T).

<sup>489</sup> Para 32.

<sup>490</sup> Para 32.

<sup>491</sup> Para 32.

<sup>492</sup> Para 32.

courts.<sup>493</sup> The circumstances for which a requester may approach a court are the same as those set out above for the lodging of an internal appeal.<sup>494</sup> Third parties may also make applications to the court to review decisions to release records that contain information about them.<sup>495</sup>

According to PAIA, applications to the court for judicial review must be made within 30 days.<sup>496</sup> These provisions were however declared unconstitutional by the in the *Brümmer*<sup>497</sup> case.<sup>498</sup> The court held that these provisions deprive requesters of an adequate and fair opportunity to seek judicial redress.<sup>499</sup> It was further reasoned by the court that because such a restriction is not a reasonable and justifiable limitation on the right of access to information, it could not be accepted by the Constitution's limitations clause.<sup>500</sup> The court thus suspended its declaration of the validity of s 78(2) for 18 months.<sup>501</sup> This suspension was granted to provide the legislature with adequate time to remedy the insufficiency in PAIA to ensure it is consistent with the Constitution. The court accordingly implemented an interim regime to regulate applications to court in a manner consistent with the objectives and spirit of PAIA.<sup>502</sup> The court ruled that an interim regime of 180 days following notification of the decision would give requesters an adequate and fair timeframe to consider whether to avail themselves of judicial relief from the courts.<sup>503</sup> It was ordered that the interim regime still be flexible enough to allow a court, as demanded by the interests of justice, to extend or condone non-compliance with the existing timeframe.<sup>504</sup> In public interest environmental cases where additional evidence or resources may be required before litigation

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<sup>493</sup> PAIA, s 78(1).

<sup>494</sup> PAIA, s 78.

<sup>495</sup> PAIA, s 78(3).

<sup>496</sup> PAIA, s 78(2).

<sup>497</sup> *Brümmer v Minister of Social Development* 2009 (11) BCLR 1075 (CC); see also Peekhaus (2014) *Journal of Information Policy* 574.

<sup>498</sup> 2009 (11) BCLR 1075 (CC) 40.

<sup>499</sup> Para 40.

<sup>500</sup> Constitution, s 36.

<sup>501</sup> Para 41.

<sup>502</sup> Para 41.

<sup>503</sup> Para 41.

<sup>504</sup> Para 41.

may proceed, the ability for a court to allow extra time may immensely relieve requesters of extra pressure.

As highlighted in Chapter 2, the courts are often viewed as a last resort however where alternatives do not exist they are relied upon almost exclusively. In South Africa, this is often the case, particularly for public interest groups that litigate on behalf of communities in the interests of the protection of the environment.<sup>505</sup> The courts in adjudicating matters of access, as highlighted in the *Biowatch*<sup>506</sup> case, must at the very least provide „well-articulated and convincing“ reasons, especially where a „general rule is departed from“. <sup>507</sup> This approach has the potential to „assist appellate courts and potential future litigants“ in knowing how best to approach the courts.<sup>508</sup>

A noteworthy solution was illustrated in the context of judicial review where a request for access to environmental information was refused in the *Earthlife*<sup>509</sup> case. The refusal was based on various grounds including the protection of the commercial information of a third party<sup>510</sup> and the commercial interests of a public body.<sup>511</sup> The court supported the refusal based on expert evidence, emphasising that the nature of the information did in fact require protection.<sup>512</sup> The court came to this conclusion after declaring that it believed it was incompetent to decide on matters of such a highly technical nature. It therefore ordered the parties to appoint one scientific and one commercial referee. Together the parties nominated one scientific and one commercial referee from the four nominated referees; the parties then went through the documents individually to decide which ones could be disclosed.<sup>513</sup> Any conflicts in their decisions were referred to the nominated referees who were

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<sup>505</sup> See generally Kidd (2013) *PER* 13(5).

<sup>506</sup> 2009 (6) SA 232 (CC) 25.

<sup>507</sup> Para 25.

<sup>508</sup> Para 25.

<sup>509</sup> 2005 (3) SA 156 (C).

<sup>510</sup> PAIA, s 36(1).

<sup>511</sup> PAIA, s 42(3).

<sup>512</sup> 2005 (3) SA 156 (C) 70.

<sup>513</sup> Para 70-75.

then required to prepare the final report for submission to the courts to make the final decision.<sup>514</sup>

Commentators have highlighted that due to the possible prevalence of access disputes in the environmental context, and the often technical nature of information before the courts in such disputes, it might well be sensible for the courts to emulate the approach taken in this case.<sup>515</sup> As such, although PAIA provides the basic structure for the appeal and review of decisions regarding access to information as set out in Chapter 2, it may not always provide for the complicated balancing act and technical scenarios that arise in the environmental context. Although the courts play the ultimate independent functionary in adjudicating these matters, it would be beneficial to have an additional legal body aside from the SAHRC that deals specifically with matters regarding access to information as other nations have successfully done.<sup>516</sup>

## **Chapter Four: Conclusion**

### **4.1 Discussion**

From the above it is evident that PAIA, in most cases, meets the basic essential legal elements necessary for an effective access to information regime, as set out in Chapter 2. The range of procedures and mechanisms unpacked from the above laws and jurisprudence aimed at providing ready access to environmental information held by both public and private actors are indispensable in the environmental context. Theoretically, the legal framework facilitates improved environmental governance and public participation through better environmental decision-making, monitoring, compliance and

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<sup>514</sup> Para 70-75.

<sup>515</sup> Du Plessis *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 218.

<sup>516</sup> Mendel (2015) *Right to Information Working Paper Series* (3) World Bank 23.



enforcement.<sup>517</sup> PAIA provides environmental interest groups better access to environmental information and thus increases their role, as encouraged by the courts in the *VEJA*<sup>518</sup> case, as effective environmental watchdogs. Despite the provisions set out in PAIA, the reality is that challenges regarding the practical aspect of physically dealing with and processing access requests; ensure the delay and practical flaws within the system.<sup>519</sup> Access to information in South Africa, despite the existing comprehensive legal framework faces issues of corruption, organisational incapacity, a lack of resources as well as the lack of a central and independent oversight body.<sup>520</sup> This inevitably has knock on affects for the outcome of information requests and therefore has the potential to frustrate the entire regime.

The CER has also emphasised that there have been slight improvements in some aspects but that certain departments, continue to manage their affairs in a non-transparent manner.<sup>521</sup> Reports also show that sometimes even when permission is granted, some records are never actually released.<sup>522</sup> As in any developing country, it takes time to implement legislation that promotes civil and political rights, especially where third generation environmental rights are concerned. In the environmental context, however, the impact of a delayed and flawed system in enforcing environmental rights reliant upon those procedural rights can be devastating. This dissertation has therefore primarily emphasized that even where the legal framework is inclusive of the key elements that make up an effective access regime, it may still be flawed through implementation failures and a general lack of political will to use the provisions set out. The broad reach of South Africa's access to information regime has heralded PAIA as a leading law in its field but it appears that there is still work to be done in terms of implementation and the need for further clarifications by the court.<sup>523</sup>

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<sup>517</sup> Du Plessis *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 198.

<sup>518</sup> 2015 (1) SA 515 (SCA) 16.

<sup>519</sup> Arko-Cobbah (2008) *IFLA Journal* 34(2) 13.

<sup>520</sup> Wood (2011) *SAJHR* 27 565.

<sup>521</sup> Centre for Environmental Rights "Signs of Hope" (2015) *Open Society Foundation for South Africa* 1.

<sup>522</sup> Kennedy (2014) *South African History Archive* 7.

<sup>523</sup> Arko-Cobbah (2008) *IFLA Journal* 34(2) 4.

## 4.2 Review of the Effectiveness of PAIA and the Essential Legal Elements

In terms of the first element, the scope and nature of access, PAIA proves to be accessible to both natural and juristic persons and is applicable to both public bodies and private bodies.<sup>524</sup> The inclusion of private bodies within PAIAs reach has also proven to be a positive move. The *VEJA*<sup>525</sup> case illustrates a warning in this regard and conveys a strong message to private companies about their obligations to ensure their operations function openly and that the abuse of the grounds of refusal provided by PAIA, will not be tolerated.<sup>526</sup>

In terms of the second element, access procedures, PAIA provides a stringent set of processes and additionally makes provision for the facilitation of requests aided by information officers<sup>527</sup> as well as the publishing of a manual<sup>528</sup> thus promoting a transparent access process that guides requesters. Several cases that have gone before the courts thus far have demonstrated that environmental information is interpreted broadly and that if procedural requirements are met, access is generally granted within the limits of the listed exceptions. As such, future requesters should ensure to take care in structuring requests in a succinct and procedurally sound fashion in order to avoid refusal or adverse cost orders as illustrated in the *Biowatch*<sup>529</sup> case. Further guidance from the experience of *Biowatch*<sup>530</sup> emphasises the important role played by public bodies in facilitating access. Public bodies are indeed under an obligation to assist requesters in gaining access to information required for the protection and exercise of constitutional rights.<sup>531</sup> Failure to do so is in essence contrary to the law and will be penalised by the

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<sup>524</sup> PAIA, s 11 (public bodies) and s 50 (private bodies).

<sup>525</sup> 2014 (1) SA 515 (SCA).

<sup>526</sup> 2014 (1) SA 515 (SCA) 83.

<sup>527</sup> PAIA, s 19.

<sup>528</sup> PAIA, s 10 and s 14(1).

<sup>529</sup> 2005 (2) SA 111 (T).

<sup>530</sup> 2009 (6) SA 232 (CC).

<sup>531</sup> PAIA, s 19.

courts. Unfortunately, until the attitudes toward PAIA are adjusted to the constitutional imperative of transparency, more access to information requests will land up in court battles. With private companies likely to have deeper pockets and public bodies often unafraid to take advantage of the public purse, poor adherence to PAIA does not fare well for public interest environmental litigants who often rely on external funding.<sup>532</sup>

As per the third element, limitations, the courts have an onerous task upon them in adjudicating upon the exceptions to accessing environmental information, especially from private bodies. The *Earthlife*<sup>533</sup> case shows that the protection of commercial interests is necessary in certain circumstances, even where environmental information is concerned.<sup>534</sup> On the other hand, the courts in the *De Lange*<sup>535</sup> case have demonstrated that where disclosure in favour of the public interest prevails, that commercial information may indeed suffer harm.<sup>536</sup> To balance the interests of withholding commercial and confidential information with the protection of the environment is a complex and intricate task. It will therefore require that requesters make a good case for themselves if the courts are to rule in their favour. As mentioned, it is often the very information that is sought which plays such a pivotal role in weighing up these interests.<sup>537</sup>

In terms of the fourth element, the protection of whistle-blowers, it has been emphasised that this role is invaluable. Although PAIA does not specifically cater to whistle-blowers, NEMA strategically encompasses them for purposes of the protection of the environment through the promotion of transparency and the protection afforded to whistle-blowers who act in this regard.<sup>538</sup> New developments by the PDAB provide hope for greater transparency and

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<sup>532</sup> Murombo & Valentine (2011) *SAJHR* 92.

<sup>533</sup> 2005 (3) SA 156 (C).

<sup>534</sup> Para 78-82.

<sup>535</sup> 2012 (5) BCLR 502 (GSJ) 166.

<sup>536</sup> Para 11.

<sup>537</sup> 2009 (6) SA 232 (CC) 33.

<sup>538</sup> NEMA, s 31.

whistleblowing in large companies and government organisations and may have positive outcomes where the environment is concerned.<sup>539</sup>

As per the fifth element, although intricate, PAIA does provide a comprehensive internal mechanism for appeal as well as recourse to the courts.<sup>540</sup> Additionally, provisions are made for third parties to appeal decisions and for them to be notified when necessary.<sup>541</sup> In practice as mentioned, ultimate oversight by the courts is a major concern and is well documented in the literature.<sup>542</sup> Despite on-going calls for an independent oversight body, this role has not been rolled out in any depth.<sup>543</sup> Recourse to the courts is a time consuming and costly endeavour and its use is unlikely by ordinary citizens, particularly those in poorer communities who are most likely to suffer environmental injustice.<sup>544</sup> The courts in this regard have endorsed litigation by environmental interest groups. Further, the *Earthlife*<sup>545</sup> case demonstrated that the courts in fulfilling their role as the ultimate oversight body for disputes regarding access to environmental information are open to creative methods for adjudicating on technical information in order to ensure that requests are dealt with meaningfully.

Although for the most part, PAIA presents us with an effective access regime on paper, especially in terms of existing global trends and the fact that information has become an extremely powerful business decision-making tool,<sup>546</sup> it appears that it still falls short in providing effective and secure access to the right of access to environmental information. In the environmental context, the few cases brought before the courts by environmental interest groups faced incredible difficulty and costs to have gotten so far. In reality, it is not possible for every access dispute to go through the court system. The crux

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<sup>539</sup> GN 703 in GG No. 39479 of 4 December 2015.

<sup>540</sup> PAIA, s 74 and s 78.

<sup>541</sup> PAIA, s 76-77.

<sup>542</sup> Peekhaus (2014) *Journal of Information Policy* 573.

<sup>543</sup> Peekhaus (2011) *Government Information Quarterly* 551.

<sup>544</sup> Peekhaus (2014) *Journal of Information Policy* 573.

<sup>545</sup> 2005 (3) SA 156 (C).

<sup>546</sup> Schikhof, S "Access to (environmental) information" (1997) *Maastricht Journal* 4 395.

therefore remains that the absence of a useable and independent enforcement mechanism to oversee the implementation of PAIA appears to be one of the primary obstacles to PAIA being an effective access regime.<sup>547</sup> Additionally, private bodies ought to be required to detach from the prevailing culture of secrecy and to publish information regarding their environmental impacts.<sup>548</sup> This information must be provided in a simple and accessible manner that allows civil society and environmental watchdog organisations to hold private bodies to account where government cannot.<sup>549</sup>

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<sup>547</sup> Peekhaus (2014) *Journal of Information Policy* 572.

<sup>548</sup> Kennedy (2015) *South African History Archive* 2.

<sup>549</sup> CER (2015) *Centre for Environmental Rights* 5.

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